104

VOLUNTARY ENVIRONMENTAL SELF-EVALUATION ACT

Y 4. J 89/1: 104/88

Voluntary Environmental Self-Evalua...

ARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 1047

VOLUNTARY ENVIRONMENTAL SELF-EVALUATION ACT

JUNE 29, 1995

Serial No. 88

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VOLUNTARY ENVIRONMENTAL SELF-EVALUATION ACT

THURSDAY, JUNE 29, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas and Jack Reed.

Also present: Raymond V. Smietanka, counsel; Diana L. Schacht, counsel; Susana Gutierrez, clerk; and Agnieszka Fryszman, minority counsel.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. The hour of 10 o'clock having arrived, this hearing set by the Subcommittee on Commercial and Administrative Law will come to order.

Lacking a hearing quorum, we will recess until the next member of the subcommittee appears. But what I have done, for those of you who are uninitiated, I have kept my record clean of starting each hearing on time. However, we will recess until a Member appears.

[Recess.]

Mr. GEKAS. I would note the arrival and presence of the ranking minority member, Mr. Reed of Rhode Island. We, thus, have a quorum already constituted. Our first two witnesses have appeared, and we will begin the hearing.

The issue to be discussed at this hearing is well-known to most of the people in this room. This bill would create a privilege from disclosure the contents of environmental self-evaluations and provides protection for those who in good faith report violations of environmental laws to responsible authorities.

The Congress has, for many years, indulged in attempting this kind of cooperative effort between the parties affected: The administrators, the people who are in the field, and the business entities and everyone else concerned. Thus far, we have noted from anecdotal evidence, that the parties have been talking and that the sponsors of the legislation and those who foster it are going to reach an agreement which will be presented to this subcommittee.

[The bill, H.R. 1047, follows:]

I

104TH CONGRESS
1ST SESSION

H. R. 1047

To provide under Federal law a limited privilege from disclosure of certain information acquired pursuant to a voluntary environmental self-evaluation and, if such information is voluntarily disclosed, for limited immunity from penalties.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1995

Mr. HEFLEY (for himself, Mr. HYDE, Mr. SCHAEFER, Mr. CRAPO, Mr. ALLARD, Mr. DELAY, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on the Judiciary and, in addition, to the Committees on Commerce, Transportation and Infrastructure, and Agriculture, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To provide under Federal law a limited privilege from disclosure of certain information acquired pursuant to a voluntary environmental self-evaluation and, if such information is voluntarily disclosed, for limited immunity from penalties.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Voluntary Environ-
5 mental Self-Evaluation Act".

SEC. 2. FINDINGS.

Congress finds that—

(1) enhanced and efficient protection of public health and welfare under Federal environmental laws depends principally on voluntary compliance by the general public, rather than enforcement;

(2) both a limited privilege from disclosure and a limited expansion of the protection of members of the general public who voluntarily disclose information as a result of a voluntary environmental self-evaluation is necessary to encourage voluntary compliance with Federal environmental laws and to protect public health and welfare; and

(3) the protection referred to in paragraph (2) will not inhibit the carrying out of regulatory authority that is mandatory under Federal environmental laws by officials who are entrusted with the duty of protecting the environment of the United States.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) ADMINISTRATOR.—The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) ENTITY.—The term "entity" means a unit of State or local government.

1 (3) FEDERAL AGENCY.—The term "Federal
2 agency" has the meaning provided the term "agen-
3 cy" under section 551 of title 5, United States Code.
4 (4) FEDERAL ENVIRONMENTAL LAW.—The
5 term "Federal environmental law"—
6 (A) means—
7 (i) the Federal Insecticide, Fungicide,
8 and Rodenticide Act (7 U.S.C. 136 et
9 seq.);
10 (ii) the Toxic Substances Control Act
11 (15 U.S.C. 2601 et seq.);
12 (iii) the Federal Water Pollution Con-
13 trol Act (33 U.S.C. 1251 et seq.);
14 (iv) title XIV of the Public Health
15 Service Act (commonly known as the "Safe
16 Drinking Water Act") (42 U.S.C. 300f et
17 seq.);
18 (v) the Solid Waste Disposal Act (42
19 U.S.C. 6901 et seq.);
20 (vi) the Clean Air Act (42 U.S.C.
21 7401 et seq.);
22 (vii) the Comprehensive Environ-
23 mental Response, Compensation, and Li-
24 ability Act of 1980 (42 U.S.C. 9601 et
25 seq.);

(viii) the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001 et seq.);

(ix) the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.);

(x) the Noise Control Act of 1982 (42 U.S.C. 4901 et seq.); and

(xi) the Pollution Prevention Act of 1990 (42 U.S.C. 13101 et seq.);

(B) includes any regulation issued under a law listed in subparagraph (A); and

(C) includes the terms and conditions of any permit issued under a law listed in subparagraph (A).

(5) VOLUNTARY DISCLOSURE.—The term "voluntary disclosure" means the disclosure of information related to a voluntary environmental self-evaluation with respect to which the protections provided under this Act apply.

(6) VOLUNTARY ENVIRONMENTAL SELF-EVALUATION.—The term "voluntary environmental self-evaluation" means an assessment, audit, investigation or review that is—

(A) initiated by a person or entity;

(B) carried out by the person or entity, or a consultant employed by the person or entity, for the express purpose of carrying out the assessment, audit, or review; and

(C) carried out to determine whether the person or entity is in compliance with Federal environmental laws (including any permit issued under a Federal environmental law).

SEC. 4. ADMISSIBILITY OF REPORTS, FINDINGS, OPINIONS, OR OTHER COMMUNICATIONS.

(a) IN GENERAL.—Subject to subsection (b) and notwithstanding any other provision of law, a report, finding, opinion, or other communication of a person or entity related to, and essentially constituting a part of, a voluntary environmental self-evaluation that is made in good faith shall not be admissible evidence in any legal action or administrative procedure under Federal law and shall not be subject to any discovery procedure under Federal law, unless—

(1) the person or entity that initiated the self-evaluation expressly waives the right of the person or entity to exclude from the evidence or procedure material subject to this section; or

(2) after an in camera hearing, the appropriate Federal court determines that—

1 (A)(i) the report, finding, opinion, or other
2 communication indicates noncompliance with a
3 Federal environmental law; and
4 (ii) the person or entity failed to initiate
5 efforts to achieve compliance with the law with-
6 in a period of time that is reasonable and that
7 is adequate to achieve compliance (including
8 submitting an appropriate permit application);
9 (B) compelling circumstances—
10 (i) make it necessary to admit the en-
11 vironmental audit report, finding, opinion,
12 or other communication into evidence; or
13 (ii) necessitate that the environmental
14 audit report, finding, opinion, or other
15 communication be subject to discovery pro-
16 cedures;
17 (C) the person or entity is asserting the
18 applicability of the exclusion under this sub-
19 section for a fraudulent purpose; or
20 (D) the environmental audit report, find-
21 ing, opinion, or other communication was pre-
22 pared for the purpose of avoiding disclosure of
23 information required for an investigative, ad-
24 ministrative, or judicial proceeding that, at the

time of preparation, was imminent or in progress.

(b) EXCLUSIONS.—Subsection (a) shall not apply to—

(1) a document or other information required to be developed, maintained, or reported pursuant to a Federal environmental law;

(2) a document or other information required to be available to a Federal agency or a State agency designated to carry out a regulatory activity pursuant to a Federal environmental law;

(3) information obtained by a Federal agency or State agency referred to in paragraph (2) through observation, sampling, or monitoring; or

(4) information obtained by a Federal agency or State agency referred to in paragraph (2) through an independent source.

SEC. 5. TESTIMONY.

Notwithstanding any other provision of law, a person or entity, including any officer or employee of the person or entity, that performs a voluntary environmental self-evaluation may not be required to give testimony in a Federal court or an administrative proceeding of a Federal agency without the consent of the person or entity concerning the voluntary environmental self-evaluation, in-

1 cluding an environmental audit report, finding, opinion,
2 or other communication with respect to which section 3(a)
3 applies.

4 **SEC. 6. DISCLOSURES.**

5 (a) IN GENERAL.—The disclosure of information re-
6 lating to a Federal environmental law to the appropriate
7 official of a Federal or State agency responsible for admin-
8 istering a Federal environmental law shall be considered
9 to be a voluntary disclosure if—

10 (1) the disclosure of information arises out of
11 a voluntary environmental self-evaluation;

12 (2) the person or entity that initiates the self-
13 evaluation—

14 (A) ensures that the disclosure is made
15 promptly after receiving knowledge of the infor-
16 mation referred to in paragraph (1); and

17 (B) initiates an action to address the is-
18 sues identified in the disclosure—

19 (i) within a reasonable period of time
20 after receiving knowledge of the informa-
21 tion; and

22 (ii) within a period of time that is
23 adequate to achieve compliance with the
24 requirements of the Federal environmental
25 law that is the subject of the action (in-

1 cluding submitting an application for an
2 applicable permit); and
3 (3) the person or entity that makes the disclo-
4 sure provides any further relevant information re-
5 quested, as a result of the disclosure, by the appro-
6 priate official of the Federal or State agency respon-
7 sible for administering the Federal environmental
8 law.
9 (b) INVOLUNTARY DISCLOSURES.—For the purposes
10 of this Act, a disclosure of information to an appropriate
11 official of a Federal or State agency responsible for admin-
12 istering a Federal environmental law shall not be consid-
13 ered to be a voluntary disclosure if the person or govern-
14 ment entity making the disclosure has been found by a
15 Federal or State court to have committed a pattern of sig-
16 nificant violations of Federal or State laws, or orders on
17 consent, related to environmental quality, due to separate
18 and distinct events giving rise to the violations, during the
19 3-year period prior to the date of disclosure.
20 (c) PRESUMPTION OF APPLICABILITY.—If a person
21 or entity makes a disclosure other than a disclosure re-
22 ferred to in subsection (b) of a violation of a Federal envi-
23 ronmental law to an appropriate official of a Federal or
24 State agency responsible for administering the Federal en-
25 vironmental law—

1 (1) there shall be a presumption that the disclo-
2 sure is a voluntary disclosure, if the person or entity
3 provides information supporting a claim that the in-
4 formation is a voluntary disclosure at the time the
5 person or entity makes the disclosure; and
6 (2) until such time as the presumption is rebut-
7 ted, the person or entity shall be immune from any
8 administrative, civil, or criminal penalty for the vio-
9 lation.
10 (d) REBUTTAL OF PRESUMPTION.—
11 (1) IN GENERAL.—The head of a Federal or
12 State agency described in subsection (c) shall have
13 the burden of rebutting a presumption established
14 under such subsection. If the head of the Federal or
15 State agency fails to rebut the presumption pursu-
16 ant to this subsection—
17 (A) the head of the Federal or State agen-
18 cy may not assess an administrative penalty
19 against a person or entity described in sub-
20 section (c) with respect to the violation by the
21 person or entity and may not issue a cease and
22 desist order for the violation; and
23 (B) no Federal or State court may assess
24 a civil penalty or criminal negligence penalty
25 against the person or entity for the violation.

1 (2) REBUTTAL.—In order to rebut a presump-
2 tion referred to in subsection (c), the appropriate of-
3 ficial of a Federal or State agency responsible for
4 administering the Federal environmental law that is
5 the subject of a violation referred to in such sub-
6 section shall be required to demonstrate, on the
7 basis of the factors described in subsection (a), and
8 to the satisfaction of the head of the Federal or
9 State agency, that the disclosure is not a voluntary
10 disclosure. If the disclosure is made directly to the
11 head of the Federal or State agency, the head of the
12 Federal or State agency shall apply the factors de-
13 scribed in subsection (a) in rebutting the presump-
14 tion. A decision made by the head of the Federal
15 agency under this paragraph shall constitute a final
16 agency action.
17 (e) STATUTORY CONSTRUCTION.—Except as ex-
18 pressly provided in this section, nothing in this section is
19 intended to affect the authority of a Federal or State
20 agency responsible for administering a Federal environ-
21 mental law to carry out any requirement of the law associ-
22 ated with information disclosed in a voluntary disclosure.

[The opening statement of Mr. Gekas follows:]

OPENING STATEMENT OF HON. GEORGE W. GEKAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA, AND CHAIRMAN SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The subcommittee is conducting a hearing this morning on H.R. 1047, introduced by our colleague from Colorado, Mr. Hefley. The bill would create a privilege from disclosure the contents of environmental self-evaluations and provides protection for those who in good-faith report violations of environmental laws to responsible authorities.

I think everyone is in agreement that, if we haven't already, we should now pass from the ERA of confrontations between government and business with respect to the environment to the ERA of cooperation. It is, I think, a given that the most effective way to keep the environment safe and clean is through self-policing. Government cannot be everywhere, so citizen and business involvement in cooperation with government is frankly the only way that our environment can be protected. The Environmental Protection Agency understands that, as does business. If there is a disagreement that we may hear discussed today, it is only with the best means.

The EPA has encouraged the use of so-called "environmental audits" or "self-evaluations" as the most direct method of preventing damage to the environment. Obviously, the investigative and litigative resources of the EPA are limited and if businesses can be encouraged to undertake self-evaluation then problems that arise can be remedied quickly.

The bill we consider today is aimed at encouraging the use of these self-evaluations by providing privilege from disclosure of these self-evaluations, and a protection for those who disclose to responsible authorities violations, but only if the entity is acting responsibly and in good faith. The Congress has on several occasions in the past created evidentiary privileges that foster the public good, such as the evidence law that protects victims at rape prosecutions from having their past lives unjustly made fodder for cross-examination. Today, we will again consider how to promote the public good. This time protection of the environment through the encouraging self-policing.

I look forward to a full discussion of this issue. We will hear from the sponsor of this legislation, Mr. Hefley, and our colleague from Tennessee, Mr. Bryant, a former United States Attorney. We will hear from a panel of individuals representing a broad cross-section of business, and another panel representing the views and experiences of State and Federal officials. I should note that some fourteen States have already acted in this area. Finally, we will hear from the president of the National District Attorneys Association and private individuals with experience in environmental cleanup and enforcement, one of whom was recently himself the Assistant Attorney General of the Environment and Natural Resources Division of the Department of Justice.

I would at this time defer my usual practice of deferring to my colleague from Rhode Island to recognize the distinguished chairman of the Judiciary Committee, Mr. Hyde, who is a cosponsor of this legislation.

Mr. GEKAS. Having said all of that, I turn to our ranking minority member, Mr. Reed, for an opening statement, if he wishes to indulge.

Mr. REED. Thank you, Mr. Chairman. I have a written statement which I would like to submit for the record and just make a few points.

Mr. GEKAS. Without objection.

Mr. REED. Thank you very much, Mr. Chairman.

Sixteen States have already rejected the proposed approach in the legislation embodied before it. Other States have embraced it. This is an issue that I think is of importance and significance and I am pleased that Mr. Hefley and Mr. Bryant are here to advocate for this issue, and we have witnesses on both sides to help us on our deliberations.

This proposed approach has not only drawn some criticism from the environmentalists but also the law enforcement community, some of whom we will hear from today: the Departments of Justice,

National District Attorneys Association, Attorneys General from a number of States.

This legislation, if adopted at the Federal level, would be the first time—simply at the Federal level—that a privilege, one that is significantly broader than an attorney-client privilege, is extended by statute to a corporation.

I want to quote from testimony presented at another hearing on this topic on behalf of the attorney general from New Jersey, an appointee of Christine Todd Whitman: "While, in theory, environmental audit privileges are intended to encourage compliance, in practice, it does little for companies attempting to comply with the law, while giving those in noncompliance a shield to hide behind."

I am concerned about immunity privilege. I think we will have to look very closely at it. I would hope that if all of our questions are not answered in this hearing, we may need to have another hearing, Mr. Chairman, to pursue some of these issues. But, again, I think in this moment, we are all looking for ways to effectively enforce the laws and do it as efficiently as possible. This is certainly a proposal that deserves close and careful consideration and I thank the chairman for calling this hearing.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Reed follows:]

PREPARED STATEMENT OF HON. JACK REED, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

Mr. Chairman, I want to commend you for holding this hearing today. This is a very important issue.

We are all looking for ways to enforce our laws as efficiently and effectively as possible—which includes encouraging companies to conduct audits, and to disclose and correct violations.

However, I have serious concerns about the scope of the legislation before us today.

Sixteen states have considered and set aside this type of legislation—more than the number that have adopted this approach—and it has garnered the opposition, not just of environmentalists, but of the law enforcement community, many of whom we will hear from today: the Department of Justice, the National District Attorneys Association, the Attorneys General of a number of states, among others.

This would be the first time a privilege—one that is significantly broader than the attorney-client privilege that already exists—is extended by federal statute to a corporation. I would like to quote from testimony presented at another hearing on this topic on behalf of the Attorney General of New Jersey, an appointee of Republican Governor Christine Todd Whitman:

> while in theory an environmental audit privilege is intended to encourage compliance, in practice it does little for companies attempting to comply with the law, but gives those engaged in environmental misconduct a shield to hide behind.

I am just as concerned about the immunity provision—of the states that have passed this type of legislation, half have rejected immunity provisions. This time I would like to quote from the Attorney General of the State of Massachusetts who recently said: "the immunity provision is akin to Congress passing a law allowing anyone who confesses to a crime to escape prosecution, so long as they apologize. . ."

I also have a couple of procedural concerns. I am glad that we were able to straighten out the issue of the Administration's witnesses, and that both Mr. Rathbun, the U.S. Attorney for the District of Kansas, and Assistant Attorney General Lois Schiffer have been allowed to appear by the Majority. I think they bring to the table a range of experience with this issue that is important for members to hear.

I also hope if the Subcommittee holds future hearings on this issue, that we will be able to hear from a wide range of state representatives. The Minority was not able to add as a witness the Attorney General of Minnesota, a state that has adopt-

ed a different type of statute, who could have provided an alternative view, or representatives from the Attorney General's office in New Jersey, which is in the process of considering this legislation. I think if we had had a little more notice we could have been able to put together a more balanced and constructive set of panels.

Finally, we were initially told that the panels would include the Administration, state representatives, industry, environmental groups, and academics. Unfortunately, there are no environmental or community groups represented at all today. However, there are four industry representatives as well as two corporate lobbyists on the witness list. I understand representatives of a few environmental organizations, including some who were at yesterday's industry-environment-law enforcement dialogue in Chicago are here in the audience and requested to testify but could not be accommodated by the Majority. I hope that they will be able at least to submit their comments for the record.

Mr. Chairman, we would do well to pay attention to the concerns of the law enforcement officials who are with us today and I will not take up any more of their time.

Thank you, Mr. Chairman.

Mr. GEKAS. The chairman of the Judiciary Committee, Henry Hyde, has submitted an opening statement. Without objection, we will enter it into the record.

[The opening statement of Mr. Hyde follows:]

OPENING STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS, AND CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY

This morning the Subcommittee opens the dialogue on a new and innovative approach to meeting the goal of a clean and healthy environment. H.R. 1047, the "Voluntary Environmental Self-Evaluation Act," provides a means for encouraging industry to take the lead in identifying and remedying environmental problems at their facilities. I have joined my colleague Mr. Hefley in co-sponsoring this legislation because I believe that it provides the proper incentives for industry to police itself, and that the result will be a move toward full compliance with our nation's environmental objectives.

There are a number of policy goals that this legislation furthers.

First: We need to pursue a course that will assist the enforcement agencies as well as business and industry in meeting the challenge of a cleaner environment. And, we need to explore methods that will accomplish this effectively and efficiently.

Second: We need to encourage businesses to improve their environmental management programs—at no expense to the federal government.

Third: We need to remove the *disincentives* to business for conducting voluntary environmental audits and provide *incentives* for carrying out audits, reporting incidents of noncompliance and taking corrective actions where necessary.

Fourth: We must create a spirit of cooperation between industry and regulators rather than a fear of intimidation.

We are repeatedly told that companies fear the information collected through their voluntary audits—which are done for the purpose of identifying, reporting, and correcting items—will be used against them in court or used as the basis for noncompliance penalties. And the evidence shows their fears to be well-grounded. Given this situation, it is hardly surprising that a company might decline to undertake an expensive and burdensome review of its facilities which it is not otherwise required to conduct.

In fact, the message we are sending to the businessman is this: as a reward for your good faith efforts to determine your environmental compliance status and correct any problems, you expose your company to hefty penalties and the threat of criminal prosecution. On top of that, you run the risk that your audit information will be used by the government or third parties to build a record against you for use in a court of law. Presented with these options, few sane corporations, regardless of how environmentally responsible they might wish to be, could be expected enthusiastically to go down that path.

Currently, 14 states have enacted laws which encourage self-evaluation audits, and several other states are considering similar legislation. In some states the statutes provide only for a governmental privilege against disclosure of the contents of the audit. Others, like H.R. 1047, also contain immunity from penalties which could otherwise be assessed for violations discovered through these audits. Although these laws are clearly a move in the right direction, they cannot effectively motivate industry towards true self-policing unless the corresponding measures are in place under Federal law.

The protection afforded by H.R. 1047 will not have any effect on the ability of the EPA or any regulatory agency to obtain data required by current law, or to determine the compliance status of a regulated entity. What it does is say that if a company voluntarily conducts an audit in which it finds and promptly corrects and reports a violation, then no civil, administrative or criminal negligence penalty would be imposed. It also encourages the company to be candid and thorough in its evaluation of the problems it discovers, thereby leading to improved internal practices and a reduced likelihood of subsequent violations.

I want to thank our witnesses in advance for appearing before the subcommittee today and look forward to hearing from each of them.

Mr. GEKAS. At the same time, a request has been made to cover these proceedings in whole or in part by a motion picture or still photographer, and, without objection, it is so ordered.

We warn the audience, if you observe any member of the committee or any Member who may be testifying falling asleep, it is not because of the atmosphere but because of the schedule that we have been maintaining.

So we now welcome our colleague from Colorado, Mr. Hefley, who will begin the testimony.

STATEMENT OF HON. JOEL HEFLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. HEFLEY. Thank you, Mr. Chairman.

You know it is customary for a witness in my position to thank the chairman and the committee for holding this hearing, but I doubly do that today, after what we have gone through the last 24 hours. I was not sure that anyone would be up to having this hearing so it is above and beyond the call of duty and I appreciate it very much because we do have witnesses in and I am glad we are going forward with it.

This bill reflects a national trend toward making privileged the findings of environmental self-audits. Thus far, 14 States across the country have adopted some version of this concept and some 34 other States are considering the idea. I was drawn to the concept because of my strong belief that effective environmental protection is built upon voluntary compliance by the American public. Yet existing laws favor the kinds of a command and control approach to environmental protection, heavy on penalties and light, I think, on incentives.

The result has been a perverse incentive to avoid any involvement in environmental protection and a profound mistrust of Government agencies charged with protecting the environment. H.R. 1047 seeks to reverse this. This bill encourages all regulated companies to perform voluntary self-evaluations, to actively identify and correct compliance difficulties. The bill also creates a privilege to protect these audits from disclosure if measures are taken to correct compliance problems uncovered by an audit unless disclosure is ordered by a court.

Finally, the bill grants limited immunity to those regulated parties that voluntarily disclose instances of noncompliance and take steps to correct them. I believe H.R. 1047 also provides strong protections against fraudulent uses of this privilege and forbids the use of that privilege from being used to cover up known instances of noncompliance.

Let me further say, it has never been my intent in this bill to shield those who are guilty of intentionally or willfully breaking en-

vironmental law. This is not a protection bill for the bad guys. If the draft before you raises that question, then we need to amend it to make sure that that is quite clear.

With the unveiling of this policy, EPA has taken steps toward encouraging voluntary compliance. Even Mr. Herman, who I believe is here today for the EPA, has acknowledged to me that we share the same objective. My belief is that the EPA policy has not gone far enough in providing the incentives to pursue these audits and still insists on the club or the penalties.

The administration has a number of specific objections. One, it claims self-evaluations are now common and that incentives are not needed. I would respond that even existing audits could be more comprehensive and that EPA's policy is having a chilling effect on full disclosure.

Two, the administration fears this bill will increase the litigation costs to prosecutors. Frankly, I think that is a little silly. Unless we stop enforcing environmental laws or attorneys agree to work for free, someone is going to have to pay. It all depends on whose ox is being gored.

The administration also fears the privileges extended in this bill go beyond attorney-client privileges and would cover facts as well as opinions. I would respond, once again, that companies are unlikely to vigorously pursue these evaluations unless they receive solid assurances that supporting documents are privileged.

What is at question here is a matter of trust. The EPA, in this and other cases, has said we would never penalize a small business or municipality or whatever for this or that type of violation, but these regulated entities have seen fines threatened, then assessed in reduced form in other statutes. The sad truth is these people do not trust the EPA. And if they do not trust you, they are unlikely to cooperate with you. Thus, the administration's policy is self-defeating.

As I said some months ago, Mr. Herman acknowledged this bill, and the EPA shares the same objectives that I have. I hope we are able to work together and pass legislation that will encourage environmental compliance. I am convinced, Mr. Chairman, that if we want, as I think all of us do, a clean environment to hand down to our children and grandchildren, we have to have people working together to do it, as you said in your opening statement.

We have to have the regulators not as adversaries but as partners. We have to have the companies with a desire to try to help clean up the environment. And I think too often we foster the idea that, boy, if we discover you have committed an infraction of any kind, we are going to land on you very, very hard.

I will give you a quick example in closing, Mr. Chairman. It doesn't directly apply here, but I think it gives the idea of the type of mistrust that is here.

I have a friend who called me last week who has a ranch near Colorado Springs. And he went out one morning and found a dozen barrels, 50 gallon drums, on his land. Some of them turned over and some liquid spilled out. His initial reaction was to get the front loader or the tractor and go get the barrels, take them up to the house and decide what to do with them and forget about it. But he said, no, I ought to do the right thing.

So he calls the appropriate officials, he said. And in just an hour or so, he had every agency known to man, from people in Mars suits, to ambulances, to firetrucks and sheriff's departments swarming over his place. But he was trying to do the right thing.

Finally, someone from the EPA told him, Mr. Watt, I have to tell you, you are responsible for this cleanup. Someone dumped on him. He was the victim. He tried to do the right thing, but he is responsible for whatever it costs to clean it up. If you have to dig out the dirt, they said it could be as much as $100,000 to do that.

We don't think that is going to happen. We think we know what has happened and it is not a dangerous substance. But this is the mental attitude. Do you think he will ever call the officials again? He will get the front-end loader.

Same with businesses. If they think they are going to get nailed, even if they spot something wrong, it is much easier to cover it up. And I think this bill would take that motivation away.

So, with that, Mr. Chairman, I would close and respond to questions.

Mr. GEKAS. Yes, we thank you.

[The prepared statement of Mr. Hefley follows:]

PREPARED STATEMENT OF HON. JOEL HEFLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. Chairman, I'd like to thank you for holding this hearing here today on my bill, H.R. 1047, the Voluntary Environmental Self-Evaluation Act.

H.R. 1047, the Voluntary Environmental Self-Evaluation Act, reflects a national trend toward making privileged the findings of environmental self-audits. At last count, 14 states have adopted some version of these laws and a total of 34 have at least considered adopting one. I believe this trend represents a reaction to government policies which, as they currently stand, discourage voluntary compliance with environmental regulations.

Effective and cost-effective protection of human health and the environment under federal laws depends primarily on the voluntary compliance by American industry; federal, state and local facilities; and the general public. Yet existing laws and policies clearly favor a command-and-control system of enforcement, and create a destructive enforce-and-penalize climate that discourages responsible regulated companies from implementing voluntary programs and working cooperatively with regulators to achieve the highest level of compliance with environmental laws.

My bill attempts to maximize compliance by lifting disincentives to voluntary action. With the thousands of environmental laws on the books, full compliance is a difficult task. My bill will encourage all regulated companies to perform voluntary self-evaluations, or audits, of their operations to actively identify and correct compliance difficulties. Many companies are reluctant to perform comprehensive audits because there are no statutory protections against the use of the audit by the EPA and others in legal proceedings against the company. In other words, the audits can now be used as self-incriminating evidence for harsh enforcement, even if the company was unaware of violations prior to completion of the audit.

My bill creates a privilege that would protect these audits from disclosure if measures are taken to correct compliance problems uncovered by the audit, unless disclosure is ordered by a court, under certain circumstances. Furthermore, if the regulated company chooses to voluntarily disclose instances of non-compliance discovered during the course of the audit and takes timely action to correct the problems, a rebuttable presumption against fines and penalties is created. It is important to stress that the bill provides strong protections against fraudulent use and cannot be applied to cover up instances of non-compliance know to the company prior to the time it conducted the self-evaluation. My bill protects responsible companies against overzealous enforcement; it does not shield those that abandon their environmental responsibilities.

As I said previously, the Voluntary Environmental Self-Evaluation Act reflects a national trend at the state level. The bill itself is modeled upon a statute enacted by the State of Colorado last year that is already achieving positive results. More than 30 states have either adopted or are considering adoption of such audit bills.

Yet, without a complimentary federal statute, these innovative state initiatives can be effectively overridden by federal authorities because responsible regulated companies conducting audits still will face the real threat of federal enforcement.

The Administration's recent comments on H.R. 1047 have been far less strident than those voiced at its introduction. Indeed, the EPA's interim policy acknowledges the value of voluntary compliance. I would hope its remaining criticisms will be debated here today. Let me address a few of those.

First, the EPA will claim the protections extended by this bill are not needed, that environmental self-evaluations are already common in the private sector and that what are needed are incentives to compliance and disclosure. I would respond that such self-evaluations do exist, primarily in large companies, but add that they are seldom as comprehensive as they could be since regulated parties fear that truly expansive programs could increase their exposure to enforcement actions. Thus, the EPA's stance that incentives to self-evaluations are not needed has a chilling effect on its desired end of disclosure.

Second, the Agency, along with the Justice Department and the National District Attorneys Association, express concern that H.R. 1047 will increase litigation costs to prosecutors. Frankly, this is disingenuous. I've heard few concerns expressed by the government over legal costs to regulated parties. Unless we stop enforcing these statutes or unless attorneys are willing to work for free, we are going to have them.

Third, the EPA contends that the protections extended by this bill are much broader than attorney-client privileges and cover facts as well as opinions. I would repeat my earlier statement than companies are unlikely to vigorously pursue such evaluations unless they receive solid assurances that supporting documents, such as the results of sampling, are privileged. In short, the regulated parties do not trust the regulators and are unlikely to pursue these programs unless their fears are eased.

The Agency had other comments—that penalties are required to recoup the economic benefits of intentional violations of environmental law, that some of the terms used in H.R. 1047 are vague "terms of art," and that H.R. 1047 would prohibit regulatory agencies from issuing "cease and desist" orders, even if a violation posed an immediate threat to public health or environment, so long as a company met the conditions for voluntary disclosure. The two former of these are open to question. There is a school of thought that economic benefit penalties deter voluntary disclosure in much the same way as punitive penalties. As for the terms of art, I would invite the Administration's suggestions on how to solve them. I would dismiss the latter comment as mistaken. It has never been my intention to extend the protections of H.R. 1047 to those who engage in willful or intentional violations, nor should regulated parties be able to use last-minute disclosures of a self-audit to escape prosecution for a willful violation.

As I stated previously, federal environmental laws are based on the premise that Americans want a clean environment and are willing to make the kind of sacrifices needed to achieve one. There is no sense in punishing a regulated party which is making this good-faith effort and even the Administration's proposal of penalty mitigation amounts to closing the barn door after the cow has fled. By that time, the damage is done. By providing incentives for environmental diligence, as this bill does, we may avoid any damage at all and achieve the cleaner environment we all want.

Thanks again for the opportunity to testify on these two bills.

Mr. GEKAS. We now turn to our colleague on the Judiciary Committee, the gentleman from Tennessee, Mr. Bryant, a former U.S. Attorney, who brings a legislative and a prosecutorial viewpoint to the witness table.

STATEMENT OF HON. ED BRYANT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

Before I proceed into my statement, I would advise the committee that I do have a meeting at 10:30 I need to be at with the majority leader, and, with your permission, I will excuse myself after I give my statement.

Mr. GEKAS. You will leave Brother Hefley alone for the wolves?

Mr. HEFLEY. He cannot do that, Mr. Chairman.

Mr. BRYANT of Tennessee. I will leave him adequately prepared.

Mr. Chairman and members, I do want to thank you for allowing me to testify on behalf of H.R. 1047, the Voluntary Environmental Self-Evaluation Act.

As you have said, Mr. Chairman, I come before this committee today wearing two hats, the first being that of a Member of Congress and the second being that of a former U.S. Attorney. As a Member of Congress, I am pleased to have the opportunity once again to inject a modicum of common sense into the way in which our Government does business; and as a former U.S. Attorney, I hope to dispel some of the legal objections which have been raised by opponents of H.R. 1047.

Frankly, Mr. Chairman, when I first learned of this legislation, I was a bit surprised that the EPA did not encourage regulated companies to perform voluntary self-evaluations or audits of their operations in order to actively identify and correct compliance difficulties. Not only would this improve our environment, but it would also seem to me to make the EPA's job a lot easier.

Unfortunately, the EPA, rather than promoting this type of responsibility, uses the information contained in these audits as evidence for harsh enforcement, even if the company was unaware of the violations prior to the completion of the audit.

Mr. Chairman, if our ultimate goal of environmental laws and regulations, which incidentally have often proved more onerous and expensive than their benefit, if the ultimate goal is to protect our natural resources, then what justification can there be for EPA's imposing huge fines on companies that are making every effort to comply with the countless numbers of rules and regulations? It does not make any sense to beat up on those companies trying to do the right thing. Is the EPA's job environmental protection or to take money from those whom it regulates?

H.R. 1047 seeks to change the current regulatory climate by giving companies an incentive to act voluntarily to literally clean up their act. It would help instill individual responsibility among regulated companies and personal responsibility certainly falls in line with the new Republican agenda that has swept into Washington.

I ran on a campaign theme of giving government back to the people. I believe people, in this instance, includes regulated companies.

One of the most disturbing aspects of the current regulatory climate is the position companies are placed in when they voluntary audit their own environmental performance. The audits can presently be used as self-incriminating evidence of a harsh enforcement even if the company was unaware of violations before the audit was completed. That kind of situation borders on posing a fifth amendment violation of being a witness against oneself.

The Voluntary Environmental Self-Evaluation Act would create a privilege that would protect these voluntary self-audits from disclosure if measures are taken to correct the compliance problems that the audit uncovers. However, the privilege is qualified. If a court, after an in camera review, determines the audit identified an area of noncompliance that had not been addressed within a reasonable period of time, then the privilege does not exist.

If a court determines that the privilege is being used for fraudulent purposes or because an investigation is imminent or on the way, then the privilege does not exist.

If a court decides there are unusual circumstances that make it necessary to disclose the report, then the privilege does not exist.

Furthermore, Mr. Chairman, the information is not privileged if it is required by environmental law. Documents required to be provided to regulatory agencies pursuant to Federal environmental law are not privileged. And information obtained by regulatory agency or through an independent source is not privileged either.

A company may decide to disclose the audit's findings of noncompliance. In that case, privilege is waived. However, a presumption against fines and penalties would be granted under the bill. If the incentive is to fix rather than to cover up, then why punish unintentional self-corrected violations?

It is important to note that a disclosure is not voluntary if the company has been found to have committed repeated violations. In other words, this bill does not shield those who abandon their environmental responsibilities.

Mr. Chairman, this common sense legislation would give companies an incentive to self-regulate on an environmental front. Many of my constituents have complained to me about the heavy handedness detected EPA regulatory enforcements. Many constituents have voiced their distrust of the Federal Government. We in Congress must act to restore the confidence of our citizens in their government and in the political process.

We are a Nation of laws. While I fully believe that the laws of the land should be obeyed, I also believe it is our duty to craft reasonable laws that meet the common sense standard.

We have made good on many of our campaign promises, and we continue to rein in bureaucracy and regulation run amok. Legislation such as H.R. 1047 is another step in the right direction of limiting Government, empowering the private sector, and instilling confidence in the American system.

Thank you, Mr. Chairman. And with that, with your permission, I would excuse myself.

Mr. GEKAS. You are excused with the thanks of the committee.

Mr. BRYANT of Tennessee. Thank you.

[The prepared statement of Mr. Bryant follows:]

PREPARED STATEMENT OF HON. ED BRYANT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. Chairman and members of this Subcommittee, I want to thank you for allowing me to testify on behalf of H.R. 1047, the Voluntary Environmental Self-Evaluation Act.

I come before this Subcommittee today wearing two hats, the first being that of a Member of Congress and the second being that of a former U.S. Attorney. As a Member of Congress, I'm pleased to have the opportunity once again to inject a modicum of common sense into the way in which our government does business. And as a former U.S. Attorney, I hope to dispel some of the legal objections which have been raised by opponents of H.R. 1047.

Frankly, Mr. Chairman, when I first learned of this legislation, I was a bit surprised that the Environmental Protection Agency did not encourage regulated companies to perform voluntary self-evaluations, or audits, of their operations in order to actively identify and correct compliance difficulties. Not only would this improve our environment, but it would also seem to make the EPA's job a lot easier.

Unfortunately, the EPA, rather than promoting this type of responsibility, uses the information contained in these audits as evidence for harsh enforcement, even if the company was unaware of violations prior to completion of the audit.

Mr. Chairman, if the ultimate goal of our environmental laws and regulations—which, incidentally, have often proven more onerous and expensive than their bene-

fit—is to protect our natural resources, then what justification can there be for the EPA's imposing huge fines on companies that are making every effort to comply with the countless number of rules and regulations? It doesn't make any sense to beat up on those companies trying to do the right thing. Is the EPA's job environmental protection, or to extort money from those it regulates?

H.R. 1047 seeks to change the current regulatory climate by giving companies an incentive to act voluntarily to literally "clean up their act." It would help to instill individual responsibility among regulated companies, and personal responsibility certainly falls in line with the new Republican agenda that has swept into Washington. I ran on a campaign theme of "giving government back to the people." I believe "people" in this case includes regulated companies.

One of the most disturbing aspects of the current regulatory climate is the position companies are placed in when they voluntarily audit their own environmental performance. The audits can presently be used as self-incriminating evidence for harsh enforcement, even if the company was unaware of violations before the audit was completed. That kind of situation borders on posing a Fifth Amendment violation of being a witness against oneself.

The Voluntary Environmental Self-Evaluation Act would create a privilege that would protect these voluntary self-audits from disclosure if measures are taken to correct the compliance problems that the audit uncovers.

However, the privilege is qualified. If a court, after an *in camera* review, determines that the audit identified an area of noncompliance that had not been addressed within a reasonable time, then the privilege does not exist. If a court determines that the privilege is being used for fraudulent purpose or because an investigation is imminent or under way, then the privilege does not exist. If a court decides there are unusual circumstances that make it necessary to disclose the report, then the privilege does not exist.

Furthermore, Mr. Chairman, the information is not privileged if it is required by environmental law. Documents required to be provided to regulatory agencies pursuant to federal environmental law aren't privileged. And information obtained by a regulatory agency or through an independent source isn't privileged, either.

A company may decide to disclose the audit's findings of noncompliance. In that case, privilege is waived. However, a presumption against fines and penalties would be granted under the bill. If the incentive is to fix rather than cover up, then why punish unintentional self-corrected violations?

It's important to note that a disclosure isn't considered voluntary if the company has been found to have committed repeated violations. In other words, this bill does not shield those who abandon their environmental responsibilities.

Mr. Chairman, this common-sense legislation would give companies an incentive to self-regulate on the environmental front. Many of my constituents have complained to me about the heavy handed EPA regulatory enforcers. And many constituents have voiced their distrust of the federal government.

We in Congress must act to restore the confidence of our citizens in their government and in the political process. We are a nation of laws. While I fully believe that the laws of the land should be obeyed, I also believe that it's our duty to craft reasonable laws that meet the common-sense standard.

We've made good on many of our campaign promises, and we continue to rein in bureaucracy-and-regulation-run-amok. Legislation such as H.R. 1047 is another step in the right direction at limiting government, empowering the private sector, and instilling confidence in the American system. Thank you, Mr. Chairman.

Mr. GEKAS. I have a couple of questions to pose to the chief sponsor of the legislation, Mr. Hefley. One of them, an allusion to what Mr. Bryant had testified to. We don't want to shield, as you have said, the perpetual violators and those who purposely evade the law. Mr. Bryant made reference that that privilege would not apply if the company or perpetrator had a series of previous violations or he so intimated. How would that work? If the entity is violating every other day, shall we say, and then turns in a self-evaluation report hoping to gain a privilege, are they not prejudiced already by having violated the law before and are they not now convicting themselves? Maybe I am overreading that part of it.

Mr. HEFLEY. I think there is that question there, and I think Mr. Bryant raised that issue. But the idea here is that the bad actors, the habitual bad actors that are doing an environmental self-audit

to try to—because they know if they are habitual bad actors, then the EPA is on them anyway and investigating them probably. So to avoid penalties they do an environmental self-audit real quick, that will not work under this bill.

Mr. GEKAS. In other words, someplace a finding has to be made that, indeed, they are recurrent violators and, therefore, this privilege might not be taken for them.

Mr. HEFLEY. That is correct and is made at the judiciary level.

Mr. GEKAS. I have no further questions at this time.

Mr. Reed.

Mr. REED. Thank you, Mr. Chairman. Mr. Hefley, not only is one of the themes currently circulating around that of smaller government, but there is also devolution to the States. I am just wondering what about those States who have specifically rejected this approach?

You noted quite rightly several States have adopted or are enthusiastic about it, but there are several States that do not want to use this approach. Would you contemplate in the legislation the ability of States to opt out; to say, no, we do not want to provide this particular approach?

Mr. HEFLEY. No, we did not contemplate that in the legislation. That is something that we can consider, though, the possibility that—I think most of us, particularly in this day of heightened awareness of the unfunded mandates and all of that, we are more cognizant of the States' concerns and we could certainly contemplate that.

Mr. REED. I have another question that goes basically to the whole notion of what would constitute an environmental audit, or voluntary self-evaluation. Does it mean assessment, or investigation, or et cetera?

There does not seem to be any standards or certification standards. So that one company could have a very elaborate, very sophisticated, ongoing technically correct audit operation, in which people would say, that is a really good audit system; and then another company might just have somebody who walks around occasionally, kicks the tires.

Would both of those, in your view, be an environmental audit? It goes to the core question of what would be an environmental audit.

Mr. HEFLEY. I could conceive both of those being an environmental self-audit. I could conceive that—what we want is to create an atmosphere where they will be aware and be looking for problems that they might be creating environmentally. And I can conceive of both approaches finding those problems. If they find the problems and, in essence, turn themselves in and correct the problems, whichever way they got to that point, it seems to me that is all right.

Mr. REED. It goes to another issue which I would like to raise with you. The possibility of someone conducting audits in good faith not discovering the problem or discovering the problem but not understanding the consequences. Assuming that the chemical on the ground was something innocent, completely innocent and later being—having someone discover in fact it was toxic or hazardous material.

In that situation, and this might be reading into the legislation, would the immunities apply? Would the privilege apply if an environmental specialist walked in and found something? Could the company assert we had an audit and we didn't think that was a problem and, if we did, we would have told you so, we are immunized and we have a privilege?

Mr. HEFLEY. I would assume that—that is a good question and I am not sure I know the answer to that. My assumption would be, if it is not something they discovered and developed a plan to correct and was discovered by an official of the EPA or something that, no, they would not be immune on that.

Mr. REED. So I think my inference, and please correct me, is that you would see this as a serious, ongoing, regular, recognized procedure which, when it discovers a problem, notes the problem and takes real actions and, in that case and probably that case alone, the privilege and the immunity would lie.

Mr. HEFLEY. Yes, that is correct; exactly right. What you want are these companies being willing to come forward and say, we have a problem. We have an overflow in our tanks and look what it indicates and here is what we are doing to mitigate that. Not having the EPA just swarm in and say, aha, and then slap them with the club and punish them because they were honest in their approach.

Mr. REED. Just one final question, Mr. Hefley, and I think your answers have been very responsive.

The voluntary issue, this gets I think also a little tricky in terms of sort of timing. And I think you indicated in your statement that you would not see it as voluntarily if it was clearly in anticipation of an enforcement action or something that was happening.

Again, I want to ask you, I would hope that you would be amenable to perhaps more specific language to clarify that intent as we go forward in the markup.

Mr. HEFLEY. Yes, I would, surely.

Mr. REED. Thank you.

Thank you, Mr. Chairman.

Mr. GEKAS. Just one other question.

Do you contemplate that if a company discovers something in which they are in violation, do they have a double duty to report it immediately and then clean it up themselves? Or if they find that there is something gone awry, do they wait until an evaluation is made by the EPA or other authorities before they begin damage control? How do you contemplate that?

Mr. HEFLEY. My sense is they would report and begin cleaning up immediately. What we want them to do is start the cleanup, is what we really want them to do. But I would conceive that they would report that so that they will not—the EPA will not come swooping down on them while they are in the middle of their mitigation process.

Mr. GEKAS. We have in the civil law a phenomenon where if a landlord allows a loose plank in one of the steps and someone is injured, and then, later, the landlord, even after the person goes to the hospital, fixes the plank, repairs it—in some jurisdictions, not in all—that could be used against him as evidence that, indeed, there was something wrong or else he would not have fixed it up.

In this bill, we want to give immunity to that landlord so that he would fix it up and we think that those kinds of principles would apply in this situation.

Mr. HEFLEY. Exactly. Exactly.

Mr. GEKAS. Any further questions?

Mr. REED. No, Mr. Chairman.

Mr. GEKAS. All right. We thank you very much.

Mr. HEFLEY. Thank you, Mr. Chairman and the committee.

Mr. GEKAS. And we will proceed with the next panel. We call to the table Carl Mattia, vice president, environment, health and safety management, the BF Goodrich Co., on behalf of the Corporate Environmental Enforcement Council, Inc.; Bruce Adler, Esq., senior environmental health and safety counsel, Corporate Environmental Programs Department, General Electric Corp., on behalf of the Compliance Management and Policy Group; Mark Stanga, environmental affairs counsel, Litton Industries, Inc., on behalf of Electronic Industries Association; and Alan Leibowitz, environmental compliance office, ITT Corp.

Mr. Mattia is listed first on my witness list.

STATEMENT OF CARL A. MATTIA, VICE PRESIDENT, ENVIRONMENT, HEALTH AND SAFETY MANAGEMENT, THE BF GOODRICH CO., ON BEHALF OF CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL (CEEC)

Mr. MATTIA. Good morning, Mr. Chairman. I am Carl Mattia, vice president of environment, health and safety management, the BF Goodrich Co., headquartered in Akron, OH. I am here today as chairman of the board of the Corporate Environmental Enforcement Council, an organization of 19 diverse companies with strong commitments to the environment and environmental compliance programs. I do have a longer written set of comments that I would ask be entered into the record of the hearing today.

Mr. GEKAS. Without objection, they will be accepted for the record.

Mr. MATTIA. Thank you, Mr. Chairman. I appreciate the opportunity to testify before you today in support of H.R. 1047, the Voluntary Environmental Self-Evaluation Act. CEEC believes that the ultimate benefit of environmental audit and disclosure legislation will be an increased level of environmental protection.

CEEC's members are supportive of strong environmental enforcement programs and believe that those who willfully and intentionally violate our Nation's environmental laws and cause environmental harm should be punished. At the same time, a regulated entity that performs environmental audits as well as its management of environmental personnel should not be put in a position of greater potential liability than the regulated entity that does not audit.

Mr. Chairman, responsible members of the regulated community that conduct environmental self-evaluations and disclose potential nonintentional violations should not create or expand their environmental civil or criminal liability or the liability of any individual.

Federal legislation is needed to remove obstacles and provide incentives that will improve environmental performance of the regulated community. We encourage this legislation because it estab-

lishes appropriate protections for a system that will provide environmental benefits.

Today, there are more than 13,000 pages of environmental regulations, and prediction is that there will be 400 more regulations which will add to those number of pages in this coming year. More of these regulations require timely reporting, monitoring, and recordkeeping.

I have a chart that I had made up that gives you an idea of the requirements that we, as a company, have in reporting to the regulatory agencies. It ranges from NPDES water discharges under the Clean Water Act, all the way to the SEC requirements on reporting.

There is information in the public record on a regular basis as a result of these regulations and requirements.

Mr. GEKAS. There is a replica of that chart in your testimony; is there not?

Mr. MATTIA. There should be. But if there is not, we will provide it immediately.

Mr. GEKAS. That is all right.

[See chart A at end of Mr. Mattia's prepared statement.]

Mr. MATTIA. In addition to these required reporting requirements and information, Mr. Chairman, we in the regulated community have participated in voluntary programs that provide additional information into the public sector, programs such as responsible care, a program of the Chemical Manufacturers Association; the 3350 program, the voluntary program established by EPA; the Green Lights Program, and waste-wise programs. So there is a great amount of information available and in the public domain. This legislation does not change or alter the availability or change these regulations that are there for that type of information in any way, shape, or form.

In order to protect the environment and our company's employees from civil and criminal prosecutions, fines, and penalties and third-party citizens' actions, we have developed environmental management strategies that include environmental auditing. But this positive activity on our part has now exposed us to potential civil and criminal prosecutions, not only are unintentional violations always possible, but there is also an increased trend where criminal prosecutions are being brought against entities that may have no knowledge or intent to commit a criminal act. In fact, an environmental manager today can even be held criminally liable under strict liability theory.

Today, Mr. Chairman, there is a tension that has developed, a significant tension, between the regulated community that wants to do the right thing, wants to come forward, wants to communicate with the public, and the regulatory enforcement approaches that we have.

It is time to eliminate this tension that discourages rather than encourages the regulated entities to self-review their environmental activities and disclose those results to regulators. It is time to change the measurement system the public, Congress, environmental activists use to judge EPA's and the Department of Justice's success in enforcing our Nation's environmental laws. It is time to change a system where enforcement success is based on the

number of administrative orders, civil actions, criminal prosecutions, criminal fines imposed, and the months of prison sentences.

The legislation being considered today takes a giant step toward a new understanding of the importance of providing the regulated community with the opportunity to find, fix, and report environmental problems without fear of self-incrimination.

Through the enactment of environmental audit protection disclosure legislation, you will be sending a message to our Nation that environmental improvement can be made by the regulated community participating in a process that opens up lines of communication and information without fear of the threat of punishment. We want to be open in our communication with regard to our environmental activities, but the present system is based on punishment as a measuring tool. It is forcing us to take steps to protect ourselves.

I have another chart (see chart B at end of prepared statement) which is an example of this. This chart is an example of an audit finding in a typical audit. You will see that the first audit finding is what I would call a sanitized audit finding, one that had to be reviewed by lawyers to make sure we did not self-incriminate ourselves in any way, shape, or form. That finding is very vague in helping us. Those of us who have to fix these problems and make sure that we are in compliance move forward appropriately.

The second finding would be the unsanitized version, which points directly to what is required to be done, how it should be done, and how and where we can look for the appropriate processes to do that.

We in the regulated community want and need to know what is occurring at our facilities. If something is wrong, we want it addressed and fixed immediately. But in order to address it properly, we need a clear and timely understanding of the problem and the response. What we do not need is to go through a system that requires legal sanitizing of our audit reports that may well protect us from the regulator but not necessarily concisely inform us of what actually occurs.

With the passage of the legislation you are now considering, there will be improvements in environment, health and safety programs of business because there will be incentives to find and fix environmental problems rather than an enforcement approach designed only to address how to punish the regulated entity.

Mr. Chairman, we believe this legislation is good for the environment, the public, the Government, and regulated entities. The environment benefits because regulated entities will not be afraid to look for environmental problems and fix them. The Government benefits because it can better utilize its enforcement resources. The public benefits because it has additional information on compliance programs from the regulated community in addition to those that they already have.

Mr. Chairman, CEEC commends the subcommittee for beginning this constructive dialogue on the important legislation before us. CEEC stands prepared to work with you to support the legislation because it is in the best interest of the environment and good corporate citizens committed to effective environmental compliance.

Thank you, again, for the opportunity to share these thoughts with you and I would be pleased to answer any questions that you may have and comments that may occur later on in this morning's meeting.

[The prepared statement of Mr. Mattia follows:]

PREPARED STATEMENT OF CARL A. MATTIA, VICE PRESIDENT, ENVIRONMENT, HEALTH AND SAFETY, THE BF GOODRICH CO., ON BEHALF OF THE CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL (CEEC)

Mr. Chairman and members of the Subcommittee, my name is Carl A. Mattia, I am Vice President, Environment, Health and Safety, for The BF Goodrich Company a two billion dollar aerospace and specialty chemical manufacturer headquartered in Akron, Ohio. During the last 28 years I have provided a wide range of environment, health and safety services to three major corporations at various levels of management. I have been a corporate environmental professional since the early 1970s and conducted my first environmental audit in 1974. More recently on behalf of CEEC and my own company I have participated in every public and EPA invited meeting to discuss their recent enforcement policy and my company has participated in the recent "Industry Dialogue" session that has been conducted.

I am here today as the Chairman of the Board of the Corporate Environmental Enforcement Council, Inc. (CEEC), an organization of 19 diverse companies with strong commitments to the environment and environmental compliance programs. CEEC is comprised of corporate counsel and management from a wide range of industrial sectors and focuses exclusively on civil and criminal environmental enforcement public policy issues. I appreciate the opportunity to testify before you today in support of on H.R. 1047, "The Voluntary Environmental Self-Evaluation Act."

CEEC is supportive of a strong environmental enforcement program directed at those who willfully and intentionally violate our nation's environmental laws and cause environmental harm. We are also concerned that environmental enforcement often serves its own interests, rather than the goal of environmental protection. One result is that those members of the regulated community who make every effort to comply and work cooperatively with the government are often treated unfairly and sometimes punished severely for their efforts. As one senior environmental official has explained, "No good deed goes unpunished."

CEEC supports the type of legislation that is being considered today that offers protections for environmental audits and related disclosures to regulatory authorities. The significant environmental benefit of such legislation is long overdue and urgently needed.

CEEC has carefully considered issues relating to auditing and disclosure and believes that the failure to have in place adequate and certain protections for audit reports creates a strong disincentive to environmental auditing. In addition, the lack of such protection has a chilling effect which severely reduces the utility of audits that are undertaken.

Stated another way, a regulated entity that audits—as well as its management and environmental personnel—should not be in a position of greater potential liability than a regulated entity that does not audit. The overriding goal of the Environmental Protection Agency is—quite simply—the protection of human health and the environment. The EPA's enforcement policy must further that goal. Given the acknowledged environmental and compliance benefits of environmental auditing and disclosure, this Committee must ensure that responsible members of the regulated community that conduct environmental self-evaluations and disclose potential nonintentional violations do not create or expand their environmental civil or criminal liability, or the liability of any individual.

I. THE NEED FOR FEDERAL LEGISLATION

Federal legislation is needed to remove the obstacles and provide incentives to improve the compliance of the regulated community. An EPA policy, or even a federal regulation will not provide the certainty and full protection that is needed. In addition, prosecutions by other government agencies, citizen suits and other third party actions will remain unfettered without federal legislation. Recognizing the agency's limitations, the regulated community—and CEEC, in particular—has actively supported the enactment of appropriate state and federal qualified audit protection and disclosure legislation.

The need for certainty is critical if auditing and disclosure are to be encouraged. In its recently issued Policy, EPA's Office of Enforcement and Compliance Assistance (OECA) emphasizes:

The Interim Policy is not final agency action, but is intended solely as guidance. It is not intended, nor can it be relied upon, to create any rights enforceable by any party. . . . EPA officials may decide to follow the guidance . . . or to act at variance with the guidance based on analysis of case-specific facts and circumstances.

OECA appears to elevate enforcement—and particularly maintenance of broad enforcement discretion—over compliance and environmental protection. There must be a way in which to define new measurements of enforcement success that both enhance the environment and move our nation into a new direction where environmental success can be measured by more then just enforcement actions.

II. The Tension Between Auditing and Enhanced Enforcement

Over the past fifteen years the use of environmental audits have grown both in their comprehensiveness and sophistication.[1] Although there are many different types of "environmental audits" EPA has defined "environmental auditing" as the "systematic, documented, periodic and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements."

Currently, no environmental law requires regulated entities to institute formal auditing programs, although the Clean Air Act Amendments of 1990 requires that an owner or operator of a permitted major source certifies the compliance status. 42 U.S.C. §7414(a)(3)(1991). Nevertheless, extensive self-monitoring *and* reporting of certain emissions, discharges and hazardous waste practices, among other things, are required under federal statutes such as the Clean Air Act, the Clean Water Act, the Emergency Planning and Community Right-to-Know Act of 1986, and the Resource Conservation and Recovery Act.[2] Self-monitoring and reporting are often required at the state and local levels as well.

Both EPA and the regulated community recognize that environmental auditing can lead to significantly higher levels of overall compliance, improved environmental performance and reduced risk to human health and the environment. They can also be used to review a company's environmental management structure and resources. By way of example, audits often are used to:

Assess and reduce environmental health and safety risks required by regulation.

Anticipate upcoming regulatory requirements (which enables facilities to manage Pollution control in a proactive manner).

Prioritize pollution prevention activities.

Help management understand new regulatory requirements and establish corporate Policies.

Assess internal management and control systems.

Measure progress toward compliance.

Improve expeditious communication regarding environmental developments to facility personnel and, where appropriate, ensure effective communication with government agencies and the public.

Assure capable and properly trained personnel are available at all times to perform emergency and other environmental functions.

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[1] International standards for auditing are now being developed. For example, if ISO 14000 is adopted, environmental audits will be required as part of overall quality standards. Continuing to allow for their disclosure and punishment for self-policing would place our industry at a competitive disadvantage, as audits are protected elsewhere and companies not punished for voluntarily disclosed violations.

[2] Although Congress has not yet included language protecting audits legislation, it considered such protection in the context of the Clean Air Amendments of 1990. The Statement of Managers contained the following language:

"Voluntarily initiated environmental audits should be encouraged and, in the course of exercising prosecutorial discretion under the criminal provisions of subsection 113(c), the Administrator and the Attorney General of the United States should, as a general matter, refrain from using information obtained by a person in the course of a voluntarily initiated environmental audit against such person to prove the knowledge element of a violation of this Act if—(1) such person immediately transmitted or caused the transmission of such information to the Administrator or the State air pollution control authorities, as appropriate; (2) such person corrected or caused to be corrected of such violation as quickly as possible; and (3) in the case of a violation that presented an imminent and substantial endangerment to public health or welfare or the environment, such person immediately eliminated or caused the elimination of such endangerment to assure prompt protection of public health or welfare or the environment." 136 Cong. Rec. S16951 (Oct. 27, 1990).

Evaluate causes for environmental incidents and determine procedures to avoid recurrence.

Assure sufficient budgeting for environmental concerns.

Provide a means for employee training and performance evaluation.

Maximize resources through recycling, waste minimization, and other pollution prevention measures, including process changes, that may benefit the environment.

Fulfill various other obligations, such as providing appropriate disclosure to their agencies (e.g, SEC), and evaluating the environmental aspects of corporate or real property transactions.

Critical review through auditing is only one piece of an environmental management system. Other environmental management features often include:

Employee reporting systems to facilitate employee reporting of environmental pro terns.

Employee training programs.

Performance incentives. By incorporating bonuses and promotions based on a manager's history of environmental compliance, a company both provides an essential incentive for compliance and demonstrates a commitment to compliance efforts.

Voluntary disclosure of environmental violations where disclosure is not otherwise required by statute or regulation.

Industry has been progressive with respect to auditing and the establishment of environmental management programs. Industry representatives have predicted that the "next generation of environmental compliance" will rely on "regulatory self-evaluation systems"—day-to-day management systems that include audits which "lead to compliance and improved environmental performance."

Environmental audits themselves are becoming increasingly sophisticated and more widely used. Audits have also been increasingly affected by the needs of multinational corporations and the desire for consistency among the environmental standards of different countries. Auditing techniques are constantly improving as well and are increasingly being included as part of value added business programs. Finally, companies are beginning to evaluate "environmental life-cycle audits" to determine the totality of impact that products and services may have on the environment.

At the same time, we are witnessing an increased tension between responsible environmental management and enforcement. Many companies are now managing themselves in an environmentally responsible manner, with only a handful operating "outside the system." Therefore, EPA's enhanced enforcement resources are now focusing on responsible corporate citizens. Given the complexity of the environmental regulatory scheme and the myriad of regulations applicable to various sectors of the regulated community, 100% compliance is extremely difficult, if not impossible. These facts underscore the need for identifying new ways to ways to set enforcement objectives and measure enforcement and compliance success.[3]

The primary concern with conducting an audit is the liability threat. This threat has led to a reluctance, especially on the part of smaller companies, to conduct audits, caution in the scope of audits that are undertaken, and narrow circulation of audit reports which could be valuable education tools with wider circulation within a company.

All of this was recently confirmed by Price Waterhouse in a survey—"The Voluntary Environmental Audit Survey of U.S. Business," 28 (March 1995). According to Price Waterhouse, 75 percent of the corporate respondents had some sort of environmental auditing program. Yet, the survey also indicated that "there is still a perceived reluctance to expand audit programs, in the face of possible enforcement." Price Waterhouse noted, "when these companies were asked what factors detract from their willingness to expand their environmental auditing program, more than 45 percent of the respondents stated that information could be used against them in citizen's suits, toxic tort litigation, civil enforcement actions or as a road map of knowledge in a criminal enforcement action." In addition, nearly two-thirds of the companies that now perform environmental audits stated that they would expand their programs if penalties were eliminated for problems that the companies themselves identified, reported and corrected.

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[3] The difficulties of managing for compliance are eloquently described by Frank Friedman, as the then Vice President for Health and Environmental Safety for Occidental Petroleum in an article, *Is This Job Really Worth It?* The Envtl. Forum, at 20, May/June 1991. Also, then EPA Assistant Administrator for Solid Waste and Emergency Response, Don Clay, often is quoted as having stated, "RCRA is a Regulatory cuckoo land of definition . . . I believe we have five people in EPA who understand what hazardous waste is."

The Price Waterhouse survey also indicates that 81 percent of the companies that audit try to protect their audits from disclosure pursuant to some sort of privilege, usually the attorney-client privilege. This necessarily increases the cost and complexity of audits, making them less useful for small and large businesses often reducing what could have been a constructive effect on an entire organization. In any event, the success of these protective measures often becomes the source of litigation increasing the cost even further due to inherent limitations in applying common law privileges to audit reports.

As there is no reliable means of protecting them from disclosure, measures are often taken to ensure that the audits are circumscribed and the audit reports carefully written using vague terminology. Without question, this dramatically reduces the usefulness of audits and audit reports, and environmental protection suffers as a result.

III. The States Take the Initiative

The growing concern over the use of environmental audit reports in enforcement proceedings, coupled with well-publicized instances of the imposition of severe penalties for disclosed violations, led various states to enact legislation protective of audit reports or disclosures, or both. Oregon enacted the first audit protection statute in 1993. Since then, a number of other states have enacted legislation, including Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Texas, Utah, Virginia and Wyoming. Numerous other states are considering such legislation.[4]

Some state statutes, such as Oregon and Utah, only provide qualified protection for audit reports. Other state statutes, such as Colorado, Idaho and Wyoming provide both qualified protection for audit reports and limited immunity for voluntary disclosures of environmental violations that are uncovered during the course of a voluntary audit.

I believe that the enactment of state legislation is a critical step forward. I also believe that the OECA's continued criticism of state legislation is singularly inappropriate. In the final section of its Policy, OECA in no uncertain terms voices its disapproval of state audit and/or disclosure legislation. Maintaining an unfortunate threatening tone, OECA states that it will:

> [S]crutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities (in OECA's opinion) prevent a state from obtaining:
>
> 1. Information needed to establish criminal liability;
> 2. Facts needed to establish the nature and extent of a violation;
> 3. Appropriate penalties . . . or from recovering economic benefit;
> 4. Appropriate sanctions or penalties for criminal conduct and repeat violations; or
> 5. Prompt correction of violations.

As CEEC emphasized in its written submission and in the oral statements of its members to EPA, OECA's repeated threat to withdraw the program delegations in states that enact audit and/or disclosure legislation is improper and quite disappointing. Under our Federalist System, states are responsible for protecting their environment. Decisions by state legislatures to foster environmental protection and encourage compliance should not be overridden by OECA officials. The threat of EPA over filing all but guarantees that the state program will never be allowed to reach its potential.

CEEC is concerned about OECA's overflowing threats. OECA should aggressively direct its enforcement attention to those who willfully and intentionally chose not to comply with environmental requirements. Second guessing the state legislatures will require a special commitment of substantial resources, without any corresponding environmental gain.

To support its criticisms of the state legislation, OECA incorrectly characterizes it as creating "across-the-board privileges" and "shields for criminal misconduct." Yet, the legislation provides for only qualified protections (as contrasted to broad privileges) and no protections for willful and intentional violators (*i.e.*, that conduct which should properly be recognized as criminal).

In the Interim Policy, OECA identifies five "reasons" why penalty mitigation is preferable to legislation establishing an absolute or qualified privilege. Not a single one of OECA's "reasons" can withstand scrutiny.

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[4] See attached chart.

First, OECA asserts that a principal rationale for an environmental audit privilege is to reduce the exposure of regulated entities that conduct self-evaluations and correct violations. OECA believes that the Interim Policy sufficiently addresses the exposure of regulated entities and therefore obviates the need to create protections through legislation.

As discussed above, however, it is clear that penalty mitigation does not provide the requisite certainty to encourage regulated entities to conduct voluntary audits, much less to disclose violations. Thus, the rationale and need for a legislative solution remains.

Second, OECA asserts that privileges run counter to efforts to open up environmental decision-making and encourage public participation in matters that affect their homes, workplaces and communities.

Contrary to OECA's assertion, the qualified protection sought by the regulated community will encourage and increase the free flow of information, enhancing the ability of the public to participate in matters that affect them. Absent protection for audit reports and related disclosures, information will not be internally communicated as openly, nor will it be released as readily to third parties. Indeed, the regulated entities will not have the incentive to uncover additional information in the first place, much less disclose it.

Third, OECA mistakenly asserts that the audit privilege can be used to shield "bad actors" or to frustrate access to crucial factual information.

OECA has repeatedly stated this objection without providing any specifics. CEEC does not want will fill and intentional violators to be protected and "bad actors" would not benefit from this legislation. Also, the legislation would not affect EPA's (or the public's) ability to obtain the broad array of documents, reports, data and other information that is currently available. Stated another way only the audit report and related self-evaluative materials will be protected and not the underlying data. Moreover, EPA will continue to have access to information that results from its own observation or from a source independent of the audit.

Fourth, OECA asserts that privilege legislation will encourage litigation because lawyers will battle over what is privileged and what is not.

Again, while there is likely to be some litigation, OECA does not point to anything which suggests that it will be excessive, and we are not aware why it would be. To the contrary, if the term "environmental self-evaluation" is well-defined, litigation will be minimal. With a well-drafted statute, parties will not be able to hide behind vague terms. Of course, nothing will prevent arguments over what may be protected, but this is no different from any other area of law.

And finally, OECA argues that the benefits of an audit privilege are speculative, while potential costs are substantial. OECA also contends that voluntary audits "have almost never been used to support criminal or civil environmental enforcement actions."

This is also not correct. As previously noted, the benefit of a qualified protection is quite significant. Moreover, OECA is aware of numerous situations where a voluntary audit was used against a company to support an enforcement action. The Price Waterhouse Survey, and the testimony of numerous stakeholders, also indicate that there are many examples. OECA is also aware that various prosecutors and enforcement officials "suggest" that audit reports need to be produced in the context of settlement negotiations if a lesser charge, civil action or reduced penalty is to be considered.

However, even if audit reports were never requested—and we must wonder why OECA protests so much about legislation if as it says it never seeks audit reports—the perception that they are sought has a tremendous chilling effect. In fact, the Price Waterhouse survey shows that such reports were sought by the agency in more than 30 cases. OECA is similarly aware that current measures used to protect audit reports greatly reduce their utility.

Finally, environmental audit protection will enhance the usefulness of audit reports by allowing regulated entities and their environmental personnel to examine their compliance status freely, and to analyze various options for improving compliance without fear that these analyses and conclusions may be used against them in an enforcement proceeding. The benefits of protection for audit reports are not "purely speculative." Any company with an environmental audit program in place will tell you that the ultimate benefit of environmental audit and disclosure legislation will be an increased level of compliance.

Mr. Chairman, on behalf of CEEC, thank you for the opportunity to share our thoughts on this important legislation with you and the members of your Subcommittee today.

Corporate Environmental Enforcement Council, Inc.

What Is It?

CEEC is an organization comprised of corporate counsel and management from a wide range of industrial sectors that focuses exclusively on civil and criminal environmental enforcement public policy issues.

What Does It Do?

CEEC:

Provides a forum for the review and discussion of current enforcement issues and the development of constructive recommendations on civil and criminal environmental enforcement policies. CEEC to date has addressed: appropriate protection for audits and related disclosures; federal sentencing guidelines; permit certifications; enforcement language in specific legislative proposals; development of alternative measures of enforcement success; supplemental environmental projects; federal over filing; specific intent issues; and enforcement initiatives.

Is a sophisticated, cross-industry organization providing comments and serving as a resource to the Administration and Congress;

Focuses exclusively on enforcement provisions of environmental legislation;

Provides an opportunity for corporate counsel and management to share experiences and information on programs, policies, and trends, relating to environmental compliance and enforcement;

Serves as a vehicle for the review of precedent setting environmental enforcement administrative and judicial actions; and

Serves as a resource to state and local groups as well as numerous trade associations on federal and state environmental enforcement issues.

Members:

AT&T, The BF Goodrich Company, Caterpillar, Inc., Coors Brewing Company, DuPont, Eli Lilly and Company, Hoechst Celanese Corporation, ITT Corporation, Elf Atochem, North America, Inc., Kaiser Aluminum & Chemical Corporation, Kohler Company, 3M, Owens Corning, Pfizer, Inc., Polaroid Corporation, Procter and Gamble, Textron, Westinghouse Electric Corporation, and Weyerhaeuser Company.

For More Information:

Please contact Steve Hellem, Executive Director, CEEC, 1100 New York Avenue, NW, Suite 810, West Tower, Washington, DC, 20005 (202) 289–1365 or CEEC's counsel, Paul Wallach, Hale and Dorr, (202) 942–8429.

Prepared for CEEC by HALE AND DORR

[6/7/95]

STATE	BILL/ACT	STATUS	SUMMARY
Arizona	S.B. 1290	Vetoed by Governor April 19, 1995	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations
Arkansas	Act No. 350	Enacted on February 17, 1995 Effective 90 days after end of legislative session	Qualified audit privilege
California	A.B. 856 S.B. 926	In committee	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations
Colorado	Revised Statutes Section 13-25-126.5	Effective June 1, 1994	Qualified audit privilege; voluntary disclosure immunity
Florida	S.B. 934 & S.B. 944 H.B. 707 & H.B. 709	Pending in to Senate Natural Resources Committee Reported out of House Natural Resources Committee	Audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations.
Georgia	S.B. 244	Passed Senate No further action expected until 1996	Qualified audit privilege

STATE	BILL/ACT	STATUS	SUMMARY
Hawaii	S.B. 1304	Failed passage by Committee on Economic Development	Qualified audit privilege and Environmental Audit Review Commission; voluntary disclosure immunity for administrative, civil and criminal violations
	H.B. 390	House may act in 1996	Qualified audit privilege
Idaho	1995 Session Law Chapter 359	Enacted on March 22, 1995	Qualified audit privilege and Environmental Audit Review Commission; voluntary disclosure immunity for administrative, civil and criminal violations
Illinois	Public Act 88-690	Effective January 24, 1995	Qualified audit privilege
Indiana	Code 13-10	Effective July 1, 1994	Qualified audit privilege
Iowa	House Study Bill 191	Passed House, failed passage in Senate	Qualified audit privilege; voluntary disclosure immunity including for criminal violations
Kansas	1995 Kansas Session Laws Chapter 204 (S.B. 76)	Enacted April 22, 1995	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations

STATE	BILL/ACT	STATUS	SUMMARY
Kentucky	Title XVIII KY Statute Section 224.01-040	Effective July 15, 1994	Qualified audit privilege
Louisiana	H.B. 2084 H.B. 2185	Passed House	Qualified audit privilege
Maryland	S.B. 685 H.B. 785	Bills failed passage by General Assembly	Qualified audit privilege; voluntary disclosure immunity including for criminal violations
Massachusetts	H. 3593	Pending before Joint Committee on Natural Resources	Qualified audit privilege
Minnesota	H.F. 1479	Enacted May 15, 1995	Qualified audit privilege; voluntary disclosure immunity
Mississippi	S.B. 3079	Enacted April 8, 1995	Qualified audit privilege; voluntary disclosure immunity including for criminal violations; reduces penalty to de minimis amount
Missouri	H.B. 338 S.B. 350	Failed passage by legislature	Qualified audit privilege, voluntary disclosure immunity including for criminal violations
	S.B. 363	Failed passage by legislature	Qualified audit privilege; voluntary disclosure immunity to reduced to de minimis amount

STATE	BILL/ACT	STATUS	SUMMARY
Montana	H.B. 412	Failed passage before end of legislative session	Qualified audit privilege; voluntary disclosure immunity including for criminal violations
Nebraska	L.B. 731	Referred to House Natural Resources Committee	Qualified audit privilege; voluntary disclosure immunity including for criminal violations
New Hampshire	H.B. 275	Tabled until 1996 legislative session	Qualified audit privilege
New Jersey	S.B. 1797 A.B. 2521	Pending in Senate Environment Committee Pending in the Assembly Policy and Rules Committee	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations
New Mexico	H.B. 800	Failed passage by House Committe	Qualified audit privilege, voluntary disclosure immunity
New York	S.B. 3683	Passed Senate on March 29, 1995	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations
North Carolina	H.B. 817 (H.B. 3624)	Passed House May 10, 1995	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations

STATE	BILL/ACT	STATUS	SUMMARY
Ohio	S.B. 138	Introduced April 18, 1995	Qualified audit privilege; voluntary disclosure immunity including for criminal violations
Oklahoma	H.B. 1388	Passed House, pending Senate action in 1996	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations
Oregon	Rev. Stat. Sec. 468.963	Enacted 1993 Effective 1994	Qualified audit privilege
Rhode Island	95-S.853	Pending in Senate Judiciary Committee	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations
South Carolina	S.B. 15	Pending in Committee	Qualified audit privilege; voluntary disclosure immunity
	H.B. 3624	Passed House May 10, 1995	Qualified audit privilege
Tennessee	S.B. 1135 H.B. 1745	Postponed until 1996	Qualified audit privilege; voluntary disclosure immunity including for criminal violations
Texas	H.B. 2473	Enacted May 23, 1995	Qualified audit privilege; voluntary disclosure immunity for administrative, civil and criminal violations

STATE	BILL/ACT	STATUS	SUMMARY
Utah	S.B. 84	Enacted March 20, 1995	Qualified audit privilege
Virginia	H.B. 1845	Enacted March 24, 1995	Qualified audit privilege; voluntary disclosure immunity
West Virginia	S.B. 362	Passed Senate Failed passage prior to House adjournment	Qualified audit privilege
	H.B. 2494	No action taken	
Wisconsin	S.B. 185	Introduced May 10, 1995	Qualified audit privilege
Wyoming	Act No. 26	Enacted on February 18, 1995 Effective July 1, 1995	Qualified audit privilege; voluntary disclosure immunity to reduced to de minimis amount
Federal	S. 582	Introduced by Senators Hatfield and Brown on March 21, 1995, referred to Judiciary Committee	Qualified audit privilege; voluntary disclosure immunity for administrative, civil, and criminal violations
	H.R. 1047	Introduced by Rep. Hefley on Feb. 24, 1995, referred to House Committees on Judiciary, Agriculture, Commerce, and Transportation & Infrastructure	Qualified audit privilege; voluntary disclosure immunity for administrative, civil, and criminal violations

(CHART A)

REQUIRED REPORTING TO REGULATORY AGENCIES

NPDES
- Permit Applications (Storm Water & Process Water)
- Spill Plans
- Discharge Monitoring Reports
- Excursion Reports

POTW
- Permit Applications
- Discharge Monitoring Reports

SAFE DRINKING WATER ACT
- Certification Reports
- Under Ground Injection Permits
- Under Ground Injection Reports

RCRA
- Permits (Part A & B)
- Manifests (Quarterly and Annual Reports)
- Exception Reports
- Closure Plans
- Emergency & Spill Plans

CLEAN AIR ACT
- Permits
- Release Reports
- Monitoring Reports
- Excursion Reports
- Emergency Planning Reports

EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW
- LEPC Plans
- 311-13 Reports

CERCLA
- Initial Listings
- Release Reports
- Superfund Site Plans
- Facility Reports

TSCA
- Registration
- Reporting Various Sections
- PCB/Asbestos Reports

FIFRA
- Compliance Reports

HMTA
- Labeling
- Packaging

OSHA
- 200 Logs
- MSDS

SEC
- 10K
- 10Q

Mr. Carl Mattia
Corporate Environmental
Enforcement Council
June 29, 1995

(CHART B)

EXAMPLE AUDIT FINDING

Sanitized Audit Finding

Facility must review the capacity of containment at the loading/unloading areas and upgrade the area as necessary.

Unsanitized Audit Finding

Tank truck unloading/loading areas outside the east side of the Facility are not provided with a containment system designed to hold the maximum capacity of any single compartment of a tank truck being loaded or unloaded. (40 CFR 112.7 (e)(4)(ii))

Mr. Carl Mattia
Corporate Environmental Enforcement Council
June 29, 1995

Mr. GEKAS. At the conclusion of the testimony of all the members of the panel, we will indulge in some questions.

Mr. MATTIA. Thank you.

Mr. GEKAS. But I want to congratulate you, you were well within the 5 minutes that we allot for witnesses, something which I forgot to announce at the outset that we are going to try to comply with, our own 5-minute rule, even for members of the committee.

So now we will turn for his 5 minutes to Mr. Adler.

STATEMENT OF BRUCE R. ADLER, SENIOR ENVIRONMENTAL HEALTH AND SAFETY COUNSEL, GENERAL ELECTRIC CO., ON BEHALF OF THE COMPLIANCE MANAGEMENT AND POLICY GROUP

Mr. ADLER. Mr. Chairman, members of the subcommittee, my name is Bruce Adler and it is a pleasure to be here today. I appreciate the opportunity to offer testimony on the issues addressed in H.R. 1047: protection of information generated by environmental audits and self-policing programs and penalty immunity for self-discovered, corrected, and reported violations.

I am the senior environmental health and safety counsel for the General Electric Co., where I have worked for 4 years. Before that, I worked for Union Carbide. Prior to that, I was an enforcement attorney with EPA in New York for nearly 8 years. I am appearing today on behalf of the Compliance Management and Policy Group, a coalition of trade associations and companies having an interest in encouraging the development of policies and legislation that promote the use of environmental management systems, including environmental auditing. Its members include the American Petroleum Institute, the Chemical Manufacturers Association, Boeing, BFI, GE, Monsanto, and WMX Technologies.

Since 1991, CMPG has worked with EPA and various States to discuss the impediments that presently exist to environmental auditing and the broad use of compliance management systems created by the present day environmental enforcements policies and practices. These disincentives operate to punish precisely the behavior we ought to encourage: a "find and fix" mentality that systematically identifies and corrects noncompliance.

The issue here is not that there should be less enforcement. In fact, enforcement continues to be an essential tool for promoting compliance. But enforcement is not an end in itself, nor should it be a primary driver of Government performance. The goal is increased levels of compliance. The question is how enforcement can be more effectively targeted to achieve that goal and greater fairness to those businesses that implement high quality compliance management systems.

Having considered, discussed, and debated this issue with EPA, States, and others for more than 4 years, CMPG is strongly of the view that present Federal law discourages the very behavior in the regulated community that is needed to bring about the highest levels of compliance. We would like for you to consider several key points.

Our regulatory system has become extremely complex and it is always changing. As Mr. Mattia pointed out, it is over 13,000 pages

long now, which makes it longer and even more complex than the Tax Code. As a result, high compliance rates can be achieved only through the full implementation of a compliance management system that includes sound corporate policies, clear lines of responsibility and accountability, adequate resources and periodic objective reviews to ensure that the system is operating properly.

Using a compliance management system will result in the identification and documentation of violations, timely correction of those violations, and reporting of the violations to authorities. It will therefore produce precisely the result we want: improved levels of compliance.

The problem is that a company that does this will suffer more enforcement, pay more in fines, be subject to more negative publicity and find it harder to get permits than others that do not implement such a system. This is because the documenting of violations creates an easy roadmap for prosecutors and others to penalize and otherwise sanction a company that has proactively searched out and resolved violations.

There are numerous instances where companies have searched for, found, corrected, and reported violations and have been fined substantially. Some of the companies with audit programs that responded to a Price Waterhouse survey cosponsored by CMPG, a copy of which we have submitted for the record, said they had been penalized for self-reported violations.

At GE, an audit determined that hazardous waste was being inadvertently placed into an unpermitted unit. We immediately stopped using the chemical that was causing the violation, immediately notified Federal and State authorities, cooperated with them, and eventually remediated the problem for a cost of about $10 million. But we underwent a 6-month intensive criminal investigation and the threat of criminal sanctions, and the transaction costs attached to that, and paid a $1.3 million civil penalty for something we found that previous inspections by local regulators State, and Federal had not.

CMPG thinks that Federal and State laws need to be modified to assure that information developed through voluntary self-policing will not be used against a company by either regulatory agencies or nongovernmental parties. As I stated earlier, our recommendations are designed to improve the effectiveness of enforcement, not cut it back. Enforcement needs to be retargeted to focus on the genuinely bad actors that present the greatest threat to the public and environment and not on the good actors who are committed to high quality environmental management programs.

EPA's recent issuance of a voluntary disclosure policy represents a step in the right direction. But that effort cannot adequately address all the disincentives that presently exist because an EPA policy cannot prevent the use of information by States and third parties. We support this legislation and believe it is needed to provide the incentives and policy direction to promote implementation of comprehensive environmental management systems.

Specifically, we believe that environmental audits should be accorded protection from disclosure and use by government agencies or third parties. We support the legislation's handling of this issue and believe it is critical to achieve its purpose. We also believe that

violations that are identified through audits or compliance management systems and are promptly corrected should not be subject to the imposition of criminal or civil penalties.

The bottom line is that the law should favor implementation of environmental audit and compliance management systems that will result in the prompt identification and correction of environmental violations. It should remove the current impediments to the development of these programs.

CMPG looks forward to working with this subcommittee as it considers H.R. 1047 and any other parties interested in appropriate Federal legislation to achieve these goals.

Thank you very much, Mr. Chairman.

Mr. GEKAS. Thank you.

[The prepared statement of Mr. Adler follows:]

PREPARED STATEMENT OF BRUCE R. ADLER, SENIOR ENVIRONMENTAL HEALTH AND SAFETY COUNSEL, GENERAL ELECTRIC CO., ON BEHALF OF THE COMPLIANCE MANAGEMENT AND POLICY GROUP

I. INTRODUCTION

I am Bruce Adler, Senior Environmental Health & Safety Counsel for the General Electric Corporation, appearing today on behalf of the Compliance Management and Policy Group ("CMPG"). I appreciate the opportunity to submit this testimony to the Subcommittee on the issues addressed in H.R. 1047: protection of information generated by environmental audit programs and penalty immunity for self-discovered and reported violations.

The CMPG is an *ad hoc* coalition of trade associations and companies having a mutual interest in encouraging the development of governmental policies and legislation that promote the use of comprehensive environmental compliance management systems, including environmental auditing, as a means of achieving a high level of public health and environmental protection. Its members include the American Petroleum Institute, AT&T, the Chemical Manufacturers Association, The Boeing Company, Browning Ferris Industries, Inc., the General Electric Company, the Monsanto Company, and WMX, Inc. Since 1991, the CMPG has been involved in discussions with the U.S. Environmental Protection Agency ("EPA") and state officials on enforcement policy and protection of information relating to environmental audits and other forms of self-policing.

In the interest of developing objective information, the CMPG early this year co-sponsored "The Voluntary Environmental Audit Survey of U.S. Business." The survey was conducted by Price Waterhouse (the "Price Waterhouse" survey).[1]

In addition, the CMPG has been instrumental in bringing about a four-day facilitated forum on environmental self-evaluation and compliance management issues—the "Dialogue on Incentives for Voluntary Compliance Programs"—in which EPA, states, environmental and citizen group representatives, and industry have participated; that forum concluded just yesterday. The Dialogue was co-sponsored by the American Bar Association, EPA, several CMPG members (GE, WMX, BFI), the CIEA, and BF Goodrich.

We are pleased that this House Subcommittee is holding hearings to consider proposed changes to federal law to address these issues. In the CMPG's view, several changes need to be made in federal and state environmental policies and law to bring about (1) higher compliance rates in the regulated community and (2) greater fairness for those businesses that implement high quality environmental auditing and compliance management systems ("CMSs"). Federal and state law needs to be modified to provide adequate assurance that information developed through voluntary self-policing—when self-policing is employed by a company to identify *and* diligently correct noncompliance—will not be used unfairly against the company by either regulatory agencies or non-governmental parties. In addition, governmental and citizen environmental enforcement needs to be redirected so that it does not discourage or unfairly penalize those companies that engage in systematic voluntary compliance assurance activities. Failure to address these issues adequately will con-

[1] Co-sponsors were the CMPG, the Coalition for Improved Environmental Audits ("CIEA"), the Environmental Auditing Roundtable, BF Goodrich Co., Eli Lilly & Co., and Texas Instruments.

tinue to discourage the very activities that will bring about the highest levels of compliance and the greatest environmental protection.

II. Some Historical Perspective

Industry was viewed by government during the 1970s and early 1980s as resisting significant environmental regulation. At the same time, environmental enforcement was in its relative infancy. Civil penalties were usually small by today's standards and there was little, if any, criminal enforcement. That began to change in the late 1970s and, by the mid 1980s, a clear trend of yearly enforcement activity increases had emerged.

This expansion continued in the 1980s because of public criticism of EPA and states to the effect that (1) not enough enforcement cases were being brought, (2) penalties were not substantial enough to deter noncompliance effectively, and (3) more criminal enforcement was needed. Many states adopted an enforcement posture similar to EPA's as a result.

Public support for increased environmental protection and enforcement had two major effects: First, it launched a period of increasing enforcement emphasis. Each year since the early 1980s, EPA's enforcement "success" has been measured by the increased number of cases brought and the increased penalties collected. Government enforcement efforts, supplemented by citizen enforcement suits for civil penalties under most of the federal statutes, have brought about a year-by-year increase in civil and criminal penalties imposed and in the number of entities and persons convicted of environmental criminal offenses. For example, the June 23, 1995, *BNA Environment Reporter* (at p. 462) reported as follows:

> A record 2,246 enforcement actions were brought in fiscal 1994, according to [EPA's *Enforcement and Compliance Assurance Accomplishments Report fiscal year 1994*] released by the Environmental Protection Agency June 16. . . .
>
> The fiscal 1994 record for enforcement actions includes 220 criminal cases, 1,596 administrative penalty actions, 403 new civil referrals to the Department of Justice, and 27 additional civil referrals to enforce existing consent decrees, the report said. Penalties for fiscal 1994 "totaled a record $151 million combined for civil penalties and criminal fines . . .," the report said.
>
> The number of EPA penalties for fiscal 1993 was somewhat lower at $134.8 million, and was $119.6 million in fiscal 1992, notwithstanding the $22 million Exxon Valdez fine, the report said. . . .
>
> EPA's criminal enforcement program "set new records in several categories," the report said, including:
>
> 220 referrals to DOJ, 36 percent more than the record of 140 set in 1993;
>
> Criminal charges brought against 250 individual and corporate defendants, 40 percent more than the record of 161 set in 1993;
>
> 99 years of jail sentences imposed, 25 percent more than the 74.3 years of incarceration imposed in 1993; and
>
> $36.8 million in criminal fines, 19 percent more than the $29.7 million assessed in fiscal 1993.
>
> States were also active in their enforcement efforts, the report said, accounting for 11,334 enforcement actions.

So the threat of stringent environmental enforcement if a company is found in violation is real.

Second, industry responded positively to the public support for environmental protection, and it has done so at an increasing pace in recent years. Business attitudes generally have become substantially more environmentally-sensitive than in the past. Many companies, such as GE, now see compliance as a positive goal to achieve rather than an unwanted burden. More attention is being given to pollution prevention and source reduction. The size and sophistication of company environmental issue management and compliance programs have increased continuously and dramatically.

However, during the 1980s another trend was also evident—environmental regulation was expanding geometrically. This began with the enactment of Superfund and promulgation of the first Resource Conservation and Recovery Act ("RCRA") regulations in 1980. Thereafter, RCRA was amended in 1984, increasing the coverage of the hazardous waste management program and making RCRA regulation much more pervasive. Major amendments of Superfund and the Clean Water Act were made in 1986 and 1987, Toxic Release Inventory reporting was passed at the same time, and the Clean Air Act was amended in 1990, each amendment calling

for more and more complex and pervasive regulations. Title 40 of the Code of Federal Regulations has thus become almost as large and certainly more complex than the IRS regulations in Title 26. At the same time, state environmental regulations and programs also expanded exponentially. Companies now must operate under an extremely complex web of rules from as many as fifteen federal laws and state analogs, with the complexity increasing each year.

Although government and citizen enforcement actions have increased in numbers and in the size of penalties, the ability of the government to police compliance through the use of inspections has not increased significantly. At a forum on auditing put on by the Minnesota Environmental Initiative early this year, a representative of the Minnesota Pollution Control Agency indicated that inspectors are able to visit only between 1 and 2% of the regulated facilities in the state each year. Those visits are typically no more than one day in length. Thus, using those statistics which we believe to be fairly representative of most states, regulated facilities are self-regulating more than 99.9% of the time.

The characteristics of present-day environmental regulation are:

Instead of being just "end of the pipe" regulation, the regulatory requirements now seek to control many phases of industrial activity within a plant or operation;

There are many more requirements than ever before;

Many of the requirements are extremely technical and complex;

Many requirements are very stringent, reflecting an increased scientific ability to detect minute amounts of a pollutant;

Federal and state requirements are often overlapping and sometimes different or even conflicting in approach;

How some regulations are to be applied is confusing; and

Because the government has limited resources and is unable to oversee much of what industry is doing, government must rely upon the regulated community to self police most of the time.

Three major results flow from these regulatory characteristics:

(1) Full (100%) compliance is very difficult to achieve today in any complex business operation. The combination of stringent requirements and their pervasive application in an ever-changing regulatory environment makes achievement of full compliance, especially on a continuous basis, very arduous. While perhaps difficult for some to accept, this fact is nonetheless a reality.

(2) The achievement of high compliance levels requires not just the application of complex technologies, but also reliance upon substantial numbers of highly-trained personnel throughout the business, from the shop floor to the highest levels of supervision. Environmental management has become much more complicated and resource intensive than ever before.

(3) To successfully manage for compliance, a company must self police, which often means exposing the company to enforcement risk for violations that are uncovered.

In sum, in 1995, we have a convergence of several phenomena: an expanding, complex, pervasive and highly technical regulatory regime; extraordinary enforcement power concentrated in regulatory agencies, offices of attorneys general and citizens at the federal and state levels; an increasing reliance by government on business self-policing; and an increasing commitment of U.S. business to environmental excellence.

How are these converging phenomena viewed by American business? From our experience, we are convinced that a majority of American businesses, large and small, are greatly concerned. Although business is increasingly committed to environmental excellence, the great difficulty in achieving full compliance on a continuous basis, when combined with major enforcement efforts driven by the assumption that full compliance is achievable, means that business—despite its best efforts—may inevitably fail in the eyes of regulators and be subjected to punitive enforcement. In fact, the activities that must be undertaken to achieve high compliance rates tend, themselves, to lead to the imposition of high fines under present laws and enforcement policies.

III. Compliance Management Systems and Environmental Auditing

A close look at modern environmental CMSs illustrates the problem.

Modern systems employed by many environmentally committed companies in the U.S. are grounded in the thesis that full compliance is a formidable goal that must be pursued continually with adequate and effective resources. The basic elements of such systems generally include the following:

Corporate-wide policy statements emphasizing to employees the importance of compliance with all regulatory requirements and protection against unreasonable risks to health and the environment;

Clearly and regularly expressed support in the implementation of such policies from all levels of management from the top to the bottom of the organization;

Adequate resource commitment to compliance so that field personnel can succeed;

Adequate training and technical support, including an organizational element responsible for tracking changes in regulatory requirements and communicating those changes to those responsible for maintaining compliance;

Clear lines of responsibility for compliance within the organization;

Routine self-policing at the facility or operational level;

Regular environmental audits of all relevant facilities and operations to ensure the effectiveness of routine self-policing;

Identification of noncompliance to those responsible for maintaining compliance and their managers; and

Correction of noncompliance in a timely and appropriate manner.

Successful operation of an environmental CMS, as described above, yields the following:

Identification of noncompliance (typically including problems that government inspectors miss because they are less familiar with the business).

Documentation of noncompliance.

Correction of detected noncompliance in a diligent manner.

Reporting to regulators of all matters that must be reported as a maker of law and, potentially, any other matters of significance.

Inherent in effective environmental management is the necessity for documentation and communication of problems. Problems (or violations) cannot be discovered and corrected unless their existence is communicated to key personnel and discussed in sufficient detail so that the most effective and cost-efficient solutions are developed. In addition, such documentation is important as a means of facilitating future problem prevention. Unfortunately, the goals of high quality CMSs are often impeded by our legal system because of the fear of many in the regulated community of the potentially adverse consequences of finding and documenting non-compliance.

IV. The Dilemma of Present Environmental Enforcement

Since effective environmental management requires both proactive searching for problems and documentation of any significant noncompliance, it is important that environmental enforcement by a regulatory agency and other potential risks to companies (citizen enforcement/potential tort litigants) not discourage the full implementation of auditing programs or CMSs. Unfortunately, present laws and many governmental enforcement policies do just that.

A high quality compliance assurance program ensures the highest possible level of compliance and environmental protection. It also means that the company implementing such a program has documented any significant noncompliance. Those documented violations are potentially punishable by either civil penalties up to $25,000 per day (or more, in some circumstances), severe criminal sanctions, or both. *See, e.g.,* 33 U.S.C. § 1319 (Clean Water); 42 U.S.C. § 6928 (RCRA); *id.* § 7413 (Clean Air). This, in turn, means that the company and its officers may be exposed to either criminal or punitive civil enforcement based on the company's own documented instances of noncompliance because the documentation can form an evidentiary admission of the violation and also evidence of intent to commit the violation unless immediately ceased, since many environmental regulations are enforced on a "per day" basis. Moreover, because the government contends that corporations are liable civilly or criminally for any acts of its employees—even if contrary to company policy—audit documents can be used as evidence against senior management.

Although the U.S. Department of Justice and a few states—such as New Jersey and California—have criminal environmental enforcement policies that indicate that a company's good faith self-policing, correction of violations, reporting, and cooperation with the authorities will be considered favorably in making prosecutive decisions, none of these policies provide any guarantees or are binding on prosecutors as a matter of law. *See. e.g.,* 4 *Dep't of Justice Manual* § 5–11.301A, "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by Violator" (July, 1991). With the wide array of general intent felonies available to prosecutors on the federal level, nothing prevents a prosecutor as a matter of law from charging a company

or its officers or employees with an environmental felony for many simple environmental violations. "Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?" 31 *Amer. Crim. L. Rev.* 123. The possibility that this may occur is exacerbated by political pressure from some to be "tough" on corporate polluters.

Current EPA enforcement policy poses two major problems for companies implementing a high quality audit program or CMS: (1) the chilling effect on audits or other forms of self-policing caused by the potential of "involuntary" disclosure, and (2) the tendency for companies that do disclose to be penalized more than those that do not. These problems remain even under EPA's new "Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement," 60 Fed. Reg. 16875 et seq. (the "Interim Policy" or the "Policy"), which provides that companies that violate the law can obtain "mitigation" of civil penalties by doing self-evaluations or audits, correcting any violation diligently that is found through an audit, notifying the agency immediately of the violation, remedying adverse environmental or public health effects of the violation and cooperating with the agency in any investigation relating to the violation.

Chilling effect on proactive self-policing. Turning to the first problem—the chilling effect caused by the potential of involuntary disclosure—documentation of noncompliance is highly vulnerable to disclosure if a prosecutor, EPA, a state, or a private litigant seeks the information by administrative or judicial subpoena, formal discovery request (e.g., a document request pursuant to the Federal Rules of Civil Procedure, see *U.S.* v. *The Dexter Corp.*, 132 F.R.D. 8 (D.Conn. 1990)) or another statutorily-authorized information request (such as 114 of the Clean Air Act, 42 U.S.C. § 7414(a)(3), which authorizes EPA, among other things, to obtain document and compliance certifications from regulated facilities). The Price Waterhouse survey found that many of the surveyed companies have had their environmental audit reports requested or subpoenaed by EPA, states and private parties. According to Price Waterhouse, 25% of the survey respondents reported that outside parties had attempted to obtain audit information. Sixty percent of the time the respondents were unable to protect the audit information under present laws. Price Waterhouse survey, p. 34.

Nothing in the new EPA Interim Policy provides assurance that the Agency will not seek audit or self-policing information and, as a matter of course, EPA criminal investigators have done so routinely in the past. The Policy simply asserts that EPA will "not request a voluntary environmental audit report to trigger a civil or criminal investigation." Once an investigation is initiated, however, the Policy states that "EPA may seek . . . any information relevant to identifying violations or determining liability or extent of harm." 60 Fed. Reg. 16878. Moreover, the Policy, by its own terms, is not binding on EPA. *Id.* at 16879. Additionally, although in limited circumstances such documentation might be protected from disclosure to the government or private litigants by the attorney-client privilege or the attorney work product doctrine, it is often not practical for companies to utilize those protections.

The work product doctrine is available only in the limited circumstance where litigation is anticipated, and thus is of little applicability in normal operating circumstances. *See. e.g.*, "Environmental Audits and Enforcement Policy," 16 Harv. Env. L. Rev. 365, 383–388 (1992).

The attorney-client privilege has broader applicability, but its use is often impractical. *Id.* at pp. 376–382. The attorney-client privilege applies to communications where facts are developed and discussed so that legal advice may be given and where such communications are held in confidence. Holding environmental audit information "in confidence," within the meaning of the attorney-client privilege, means for corporations that the distribution of the information must be limited as much as is practically possible. Because the privilege can only be retained where the information is not shared widely within the company, many in the regulated community feel that seeking to retain the privilege is counterproductive to the curative goals of the environmental audit or CMS programs.

Indeed, there are compelling policy reasons why businesses should not be encouraged to utilize the attorney-client privilege to protect audit information:

> Facility managers and their staffs need to work through problems over time, and their frank, open "brainstorming" is essential to finding creative, workable solutions;
>
> If operations personnel are going to have primary responsibility for the compliance function, it needs to be removed from the exclusive domain of the lawyers and environmental specialists; and
>
> Procedural restrictions inherent in the close protection of confidentiality in order to retain the attorney-client privilege hamper the free exchange of correc-

tive solutions among facilities so that an entire organization can benefit from lessons learned.

Thus, the attorney-client privilege is not a satisfactory solution to the need for protecting audit information.

In the absence of a specific privilege to protect environmental audit information, and given concerns about the successful application of attorney-client privilege, many companies believe that the risk of enforcement or third-party discovery of self-generated non-compliance information adversely affects the entire auditing process. The scope of the audit, the candor with which employees share information with the auditors, and the specificity with which the auditors document their findings are all adversely affected. As a consequence, fourteen states have enacted statutory environmental audit privileges in just the last two years: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia and Wyoming. This trend is a strong indicator of the depth of the problem perceived by the regulated community regarding the risks that the present environmental enforcement regime presents for voluntary self-policing. It also shows that these state legislatures believe it is essential to reform the law to ensure that responsible environmental auditing and other forms of self-policing are widely done.

Unfair treatment of companies fully implementing auditing prorams and CMSs. As for the second problem—the tendency that good actors will be unfairly penalized—companies that fully implement environmental audit programs or CMSs report many more instances of noncompliance to EPA and states than businesses without such systems. This will occur primarily because companies that actively look for noncompliance will find more of it than those that do not. As a result, despite the possibility of penalty mitigation under EPA's new Interim Policy, these businesses are likely both to be penalized to a greater degree than their less diligent competitors and to appear to have worse track records of noncompliance and penalties—a situation which could adversely affect the businesses' ability to compete effectively and to obtain key permits or contracts.

EPA's Interim Policy does not adequately address this problem. Three significant shortcomings of the Policy are that (a) the Policy only covers audits and self-evaluations, not violations uncovered by the daily operation of a CMS; (b) the Policy does not offer the opportunity for full penalty mitigation for violations that are found voluntarily but are required to be reported to EPA or states pursuant to a statute, rule or permit term; and (c) the Policy is not binding on EPA personnel. Most violations that are uncovered will not be eligible for full penalty mitigation under EPA's Policy because they are either uncovered by the operation of a CMS (rather than an audit or self-evaluation or because they have to be) or they have to be reported as a matter of law. One of the CMPG members—WMX—has found that with its mature auditing and compliance management programs, 88% of the violations it finds are found through the operation of its CMS and not through audit self-evaluations. Many of those violations have to be reported pursuant to permit terms. The EPA Policy simply does not have the salutary effect EPA hoped it would have.

It is undeniable that companies that do not self police often escape major enforcement simply because of a lack of state and federal inspection capability. This means that the "good actors" will almost certainly be punished while many "bad actors" may not. The increasing penalty assessments exacerbate this problem because they raise the level of penalties assessed not only on the "bad actors" that are caught but also on the "good actors" that effectively turn themselves in. Thus, the present system contributes to a competitive imbalance favoring those who do little, if any, self-policing and disclosure. That imbalance is brought about by several factors, including:

The considerable costs of self-policing (the Price Waterhouse survey found that the mean cost of operating an audit program among survey participants, including large and small companies, is $367,285 per year; the mean cost of auditing one facility is $15,401; and yearly cost of audit program operation for large companies ranges up to $4 million; CMSs are considerably more expensive than audit programs since audits are just one of many components needed);

Operational constraints caused by extraordinary efforts to comply (i.e., a company that discovers a violation may have to close down all or a portion of a plant or otherwise disrupt production to correct the problem); and

Penalty risks occasioned by self-disclosure.

Not surprisingly, Price Waterhouse survey participants responded that the cost of auditing was a critical factor in deciding whether to audit. When the costs of auditing and CMS operation are weighed against the risks of pro actively finding violations in the context of the present legal and regulatory regimes, it is not surprising that some companies either do not audit or do not put substantial resources into

auditing and CMS activities. The present environmental legal system makes it more difficult, rather than easier, for those who advocate higher levels of environmental protection in company operations.

Thus, the messages to companies from the present regulatory system are conflicting: One message, the one EPA and states intend to send, is that companies that do not comply will be subjected to punitive enforcement if they are caught. A second message, not intended but in fact sent, is that companies that do the self-policing necessary to achieve high rates of compliance (e.g., implement CMSs) are likely to be penalized, under EPA's new Interim Policy or applicable state law, at least for those violations that do not qualify for full mitigation of the gravity component of a penalty. The second message undermines the first because, while there is risk in not complying, there is also risk in doing those things that are necessary to achieve the highest rates of compliance.

The risk occasioned by present enforcement policies for those that would implement desired environmental auditing and related self-policing systems is well understood within the regulated community. There are several notorious cases in which the consequences of self-disclosure have resulted in substantial penalties for the company that disclosed.[2] The maximum penalty mitigation EPA's Interim Penalty Policy would recognize for even voluntary discovered and reported violations found through the operation of a CMS (rather than an audit) or, which have to be reported by law, is 75% of the gravity component of the penalty. The "economic benefit" component would not be affected. This could leave a very large penalty despite the fact that the violation was systematically discovered, remedied in a diligent manner, and reported immediately to the agency. The prevalent view in the regulated community is that even 75% mitigation of the gravity component of a penalty is still a significant disincentive to finding violations. Moreover, many states do not even have EPA's level of penalty mitigation available.

Businesses routinely ask their advisors and legal counselors what can be done to minimize or eliminate environmental enforcement risk. Under the present enforcement systems there is no clear answer. Although aggressive self-auditing programs and CMSs will bring about the highest levels of compliance, there is no assurance under the present law that noncompliance information generated by such systems—even when the noncompliance is inadvertent and promptly corrected—will not be used against the company by a zealous prosecutor, a civil governmental enforcer, a citizen enforcer, or a private tort litigant.

The consequence is that some businesses have been discouraged from employing audits for any purpose. In 1992, the National Law Journal surveyed corporate counsel and concluded that over 37% of the companies surveyed had never conducted a single environmental audit. The indication was that the disincentives in the enforcement system were a significant contributor to corporate decision-making. Three years later, the Price Waterhouse survey (1995) indicated that 25% of the companies surveyed had no environmental audit program. That survey similarly found that there is a perceived reluctance among industry to expand audit programs in the face of possible enforcement action:

> In fact when asked what factors detract from their willingness to expand their environmental auditing program, more than 45% of the respondents stated that information could be used against them in citizen's suits, toxic tort litigation, civil enforcement actions or as a road map of knowledge in a criminal enforcement action.
>
> When asked what would encourage their company to perform even more audits, the most frequently cited reason was if enforcement policy eliminated penalties for self-identified, reported and corrected items (64%), and the second reason cited was if there was a federal privilege law in place (49%), and the third reason was if a state privilege law in place (42%).

[Price Waterhouse survey, p. 28.]

In short, the existing laws and enforcement policies discourage the corporate behavior most likely to produce high compliance rates and environmental protection. There is a need, consequently, to redirect EPA (and corresponding state) enforcement responses to provide adequate assurance that self-policing information—if it is employed by a company to identify and diligently correct noncompliance—will not be used against the company to impose penalties except in particularly aggravated

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[2] See, e.g., the attached article regarding the *Coors* case in Colorado. Exhibit A. That case was of such concern to the regulated community that it spawned audit privilege legislation in Colorado, including a section protecting from enforcement certain voluntary disclosures of noncompliance. Exhibit B. A summary of several other case examples that demonstrate the risk occasioned by present enforcement policies is set forth in Exhibit C.

circumstances. Additionally, protection must be provided from the use of audit and other voluntary self-policing information for other purposes (citizen enforcement, tort litigants, etc.) against the company that has generated it.

For several reasons, there does not seem to be a clear avenue for EPA to accomplish all of this through policy implementation alone:

EPA cannot ensure protection of audit information from nongovernmental parties.

EPA cannot ensure that states will adopt parallel laws or enforcement policies that will, at all levels of government, bring about fair treatment and eliminate disincentives to auditing and CMS implementation.

EPA, in revising its audit policy, did not propose penalty mitigation that is binding on its own personnel.

EPA cannot bind the Department of Justice.

EPA has not offered a penalty mitigation system that treats violations equally whether or not they have to be reported as a matter of law.

EPA has not offered a penalty mitigation system that covers violations uncovered through the systematic operation of a CMS.

EPA has openly threatened states that have enacted audit privilege or penalty immunity laws.

EPA has not been able, left to its own devices, to eliminate all major disincentives to the full implementation of either auditing programs or CMSs.

For all of these reasons, Congress should enact a law that will eliminate those disincentives effectively at all levels of government.

V. Recommendations

We want to emphasize that the recommendations of the CMPG are directed to improving the effectiveness of enforcement vis-a-vis voluntary compliance efforts, not to cutting back on enforcement. We believe enforcement should be retargeted to focus on the genuinely bad actors which present the greatest threat to public health and the environment and not on the good actors who are committed to high quality environmental management and self-evaluation.

Due to inevitable resource limitations, environmental regulators will always have to rely on self-evaluation to assure compliance. The law and regulatory systems should thus seek to maximize and encourage, not punish, companies that implement environmental auditing and compliance management systems.

Our recommendations are that:

(1) The importance of company audit programs or CMSs in assuring high levels of compliance should be recognized and taken into account by Congress in any legislation regarding penalty immunity for violations that are discovered, corrected, and properly reported due to an audit or the operation of CMS programs.

(2) If a company is implementing an audit program or a self-policing CMS in good faith and finds a violation and corrects it in a diligent manner and properly reports it, then the law should preclude the imposition of a civil or criminal penalty against the properly reporting company unless aggravating circumstances are present.

(3) This no-penalty law should apply to violations found through the operation of audits or CMSs, regardless of whether the violations that are found, corrected, and properly reported have to be reported to a regulatory agency as a matter of law.

(4) The following aggravating circumstances should be the sole exceptions to the no-penalty policy:

(a) Deliberate violations (these should be candidates for either civil or criminal sanctions, although companies that detect, correct and properly report such a violation should not be prosecuted criminally unless company's senior management participated willfully in the violation or company policies or lack of preventive actions or systems contributed materially to the occurrence of the violation);

(b) Violations resulting in substantial environmental harm or substantial threat to the public health;

(c) Violations that are not corrected diligently.

(5) Reasonable protection for companies from use of voluntarily-generated compliance information against them by anyone should be legislated.

(6) A uniform approach, applicable alike to federal environmental programs and state-administered federal programs, should be legislated.

VI. Conclusion

At stake is the effectiveness of environmental enforcement in bringing about the highest levels of compliance in the regulated community. Adjustments in the legal and regulatory regime that will retarget enforcement activities toward the real offenders and effectively encourage major investment in, and commitment to, compliance management systems can and should be made. The CMPG looks forward to working with this Subcommittee, as it considers H.R. 1047, and any other parties interested in appropriate federal legislation to achieve these goals.

EYE ON ENFORCEMENT

Coors Case Shows the Risks and Rewards of Conducting Environmental Audits

By Linda L. Raclin. The author is an attorney with the law firm of Kirkpatrick & Lockhart in its Washington, DC office.

After conducting an environmental audit of its Golden, CO brewery at a cost of $1 million, the Coors Brewing Company (Coors) discovered air pollution violations that it voluntarily reported to the Colorado Department of Health (CDH). Coors recently agreed to pay $237,000 in penalties to settle charges for these violations in a case that exemplifies the risks and rewards of conducting environmental audits.

The Coors case shows that if a company conducts an environmental audit and discovers and then reports violations to regulators, it may face stiff penalties. The penalties may be lessened somewhat, as they were in the Coors case, if regulators take into account the company's audit, its disclosure of violations, and its cooperation throughout an investigation. However, there are no guarantees of leniency or amnesty.

Fearing that the tenuous protection offered to companies under existing laws and policies could dissuade them from conducting audits, at least three state legislatures — Oregon, Ohio, and Colorado — may introduce, or are considering, or have adopted legislation that would protect audit information from disclosure pursuant to a statutorily created "self-evaluative privilege," and it is possible that other states may follow suit. Still other states might require companies to disclose this information but provide them with immunity from prosecution for any violations derived from audit information.

The Coors Settlement

In 1992, Coors voluntarily conducted an internal inventory of air pollution emissions from its Golden, CO facilities, and provided the results of its investigation to the Colorado Air Pollution Control Division of the CDH (APCD). Coors also provided APCD with numerous Air Pollutant Emission Notices (APENs) and permit applications for Volatile Organic Chemical (VOC) emissions.

"The Coors case shows that if a company conducts an environmental audit and discovers and then reports violations to regulators, it may face stiff penalties."

After receiving this information from Coors, the APCD issued a Notice of Violation on Feb. 18, 1993. A few weeks later Coors met with the APCD and presented data, views, and arguments concerning the alleged violations.

On July 21, 1993 the APCD issued a Compliance Order (Order) and assessed Coors penalties of $1,050,300. The Order concluded that Coors had (1) violated statutory and regulatory requirements to file APENs and obtain permits, (2) failed to submit a report on VOC emissions on how and when reasonably available control technology (RACT) would be attained, (3) failed to install bottom or submerged filling technology for certain tanks, and (4) was subject to major source requirements with which it did not comply.

Based on these conclusions, the APCD initially decided to assess Coors a civil penalty in the amount of $1,750,500. This penalty was then reduced a total of 40 percent because of Coors' efforts to disclose information and to cooperate with the CDH. The penalty was reduced by 15 percent because Coors had made voluntary and complete disclosure of violations; by another 15 percent because Coors cooperated after disclosure; and by another 10 percent because the company had a compliance program in place, for a total 40 percent reduction.

Following the issuance of this Order, the APCD and Coors entered a Settlement Agreement pursuant to which Coors agreed to pay a $100,000 civil penalty and a $137,000 economic benefit payment (representing the amount the APCD believed Coors saved by not having appropriate pollution controls in place) to the state's general fund. Coors also agreed to follow a schedule to bring all of its sources into compliance; reduce its annual VOC, NOx, and SO_2 emissions; and relinquish emissions credits it had obtained for the emission of 70 tons of VOCs.

Even though these penalties are much less than those originally assessed, they are still substantial, considering that they stem from Coors' voluntary disclosures. Thus, it is clear that a company conducting an audit, even at great effort and expense, runs a high risk of being assessed significant penalties.

Legislative Response: Privileged Treatment for Audit Information

In response to the dilemma this creates for companies that want to

(see Coors, Page 7)

COORS

(Continued from Page 3)

evaluate and improve their environmental compliance, several state legislatures have begun to take action.

Recently, Oregon became the first state to enact a qualified self-evaluative privilege for environmental audits. The self-evaluative privilege may be easier for a company to invoke than the attorney-client privilege (which requires the company to hire a lawyer) or the work product privilege (which applies when litigation is imminent).

Oregon Statute

The Oregon statute encourages owners and operators to conduct voluntary internal environmental audits and clarifies that all "communications" relating to internal audits will be privileged. Next, the statute specifies the circumstances under which an environmental audit report will be privileged. In a civil or administrative proceeding, or a criminal proceeding, an audit report will be privileged unless a court determines that: (1) the privilege is asserted for a fraudulent purpose; (2) the material is not subject to the privilege; or (3) even if subject to the privilege, the audit reveals environmental violations under federal, state, or local law, and the corporation has not "promptly initiated and pursued with reasonable diligence" the appropriate efforts to achieve compliance.

The privilege does not apply, however, to reports or documents that are required to be submitted to a regulatory agency; to information obtained by an agency's observation, sampling, or monitoring activities; or to material obtained independent of the audit.

In an Oregon criminal proceeding, an audit report will also not be privileged if a court determines that the prosecutor has demonstrated that the audit information is relevant to a violation, that there is a compelling need for the information, that the information is not otherwise unavailable, and that the prosecutor is unable to obtain the substantial equivalent of the information without incurring unreasonable cost and delay.

Finally, if an Oregon prosecutor has probable cause to believe that an offense has been committed based on a source independent of the audit, he or she may obtain the audit report with a search warrant or subpoena. The report will then be placed under seal, the parties will submit petitions, and the court will hold an *in camera* hearing to determine whether, and which portions, of the report must be disclosed. If the report is revealed to prosecutors, the statute provides that its distribution may be limited.

Colorado Statute

The Colorado legislature is considering a similar bill that creates a self-evaluative privilege which was originally introduced in 1989. The bill creates a privilege for information derived from a company's voluntary environmental self-evaluation, unless the company failed to correct violations that are discovered within a reasonable time, or asserts the privilege for a fraudulent purpose, or if there are unusual circumstances that compel revelation. Companies should be aware that state regulators may claim they need to review audit information to determine whether any of these circumstances are present. The bill also creates a privilege against certain persons being compelled to testify (e.g., consultants) regarding the self-evaluation without the consent of the person or entity performing the self-evaluation.

In the event a company is asked to turn over audit information, or chooses to do so on its own, the Colorado bill provides that for voluntarily disclosed violations, there will be a rebuttable presumption that the disclosures are voluntary, making the person or entity disclosing the violation immune from administrative, civil, or criminal penalties.

The bill defines voluntary disclosures as those which are made promptly after the information is obtained and arise out of a voluntary self-evalu[illegible] and are made by a person or entity [illegible] initiates action to address the violations that are disclosed, and who cooperates with state regulators in an investigation. To rebut the presumption that disclosures are voluntary, the state must show that the disclosure was not voluntary. The bill states that disclosures which are required to be made under a specific permit condition or order are involuntary.

Finally, the Colorado bill provides that required disclosures made pursuant to an environmental law, regulation, or permit, as well as information obtained by a regulatory agency through observation, sampling, or monitoring, or from an independent source, will not be privileged.

The Ohio legislature is expected to introduce environmental crimes legislation this month that will include provisions providing protection [illegible] environmental audits.

These laws, if enacted, will go a long way toward encouraging companies to conduct environmental audits which have numerous benefits. Without the protections provided by these laws, however, many companies may find that like Coors, they may conduct audits but still pay fines, albeit of a lesser but still significant amount. ◆

Con Ed

(Continued from Page 2)

false statements in a matter within the jurisdiction of a federal agency) relating to both the Comprehensive Environmental Response, Compensation, and Liability Act, and EPCRA. According to the indictment, "Con Edison falsely stated that it had not been confirmed whether asbestos covered in a building near the ex[illegible]sion site had come from the building itself or Con Edison's steam pipe." ◆

1994

An Act

SENATE BILL 94-139

BY SENATORS Meiklejohn, Johnson, Norton, Ament, Casey, Mutzebaugh, Owens, Tebedo, and Wattenberg;
also REPRESENTATIVES Foster, Acquafresca, Armstrong, Chlouber, George, Kerns, Morrison, Pankey, Reeser, Schauer, and Taylor.

CONCERNING ENVIRONMENTAL SELF-EVALUATION, AND, IN CONNECTION THEREWITH, CREATING AN ENVIRONMENTAL SELF-EVALUATION PRIVILEGE AND CREATING A PRESUMPTION AGAINST THE IMPOSITION OF ANY ADMINISTRATIVE, CIVIL, OR CRIMINAL PENALTIES FOR VOLUNTARY DISCLOSURES ARISING OUT OF ANY ENVIRONMENTAL SELF-EVALUATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 25 of title 13, Colorado Revised Statutes, 1987 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

13-25-126.5. Documents arising from environmental self-evaluation - admissibility in evidence. (1) THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT PROTECTION OF THE ENVIRONMENT IS ENHANCED BY THE PUBLIC'S VOLUNTARY COMPLIANCE WITH ENVIRONMENTAL LAWS AND THAT THE PUBLIC WILL BENEFIT FROM INCENTIVES TO IDENTIFY AND REMEDY ENVIRONMENTAL COMPLIANCE ISSUES. IT IS FURTHER DECLARED THAT LIMITED EXPANSION OF THE PROTECTION AGAINST DISCLOSURE WILL ENCOURAGE SUCH VOLUNTARY COMPLIANCE AND IMPROVE ENVIRONMENTAL QUALITY AND THAT THE VOLUNTARY PROVISIONS OF THIS ACT WILL NOT INHIBIT THE EXERCISE OF THE REGULATORY AUTHORITY BY THOSE ENTRUSTED WITH PROTECTING OUR ENVIRONMENT.

(2) FOR THE PURPOSES OF THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(a) "ADMINISTRATIVE LAW JUDGE" MEANS ANY PERSON APPOINTED TO BE AN ADMINISTRATIVE LAW JUDGE PURSUANT TO PART 10 OF ARTICLE 30 OF TITLE 24, C.R.S.

(b) "ENVIRONMENTAL AUDIT REPORT" MEANS ANY DOCUMENT, INCLUDING ANY REPORT, FINDING, COMMUNICATION, OR OPINION OR ANY DRAFT OF A REPORT, FINDING, COMMUNICATION, OR OPINION, RELATED TO AND PREPARED AS A RESULT OF A VOLUNTARY SELF-EVALUATION THAT IS DONE IN GOOD FAITH.

(c) "ENVIRONMENTAL LAW" MEANS ANY REQUIREMENT CONTAINED IN ARTICLES 7, 8, 11, 15, AND 18 OF TITLE 25, C.R.S., OR ARTICLE 20 OF TITLE 30, C.R.S., IN REGULATIONS PROMULGATED UNDER SUCH PROVISIONS, OR IN ANY ORDERS, PERMITS, LICENSES, OR CLOSURE PLANS UNDER SUCH PROVISIONS.

(d) "IN CAMERA REVIEW" MEANS A HEARING OR REVIEW IN A COURTROOM, HEARING ROOM, OR CHAMBERS TO WHICH THE GENERAL PUBLIC IS NOT ADMITTED. AFTER SUCH HEARING OR REVIEW, THE CONTENT OF THE ORAL AND OTHER EVIDENCE AND STATEMENTS OF THE JUDGE AND COUNSEL SHALL BE HELD IN CONFIDENCE BY THOSE PARTICIPATING IN OR PRESENT AT THE HEARING OR REVIEW, AND ANY TRANSCRIPT OF THE HEARING OR REVIEW SHALL BE SEALED AND NOT CONSIDERED A PUBLIC RECORD, UNTIL AND UNLESS ITS CONTENTS ARE DISCLOSED BY A COURT OR ADMINISTRATIVE LAW JUDGE HAVING JURISDICTION OVER THE MATTER.

(e) "VOLUNTARY SELF-EVALUATION" MEANS A SELF-INITIATED ASSESSMENT, AUDIT, OR REVIEW, NOT OTHERWISE EXPRESSLY REQUIRED BY ENVIRONMENTAL LAW, THAT IS PERFORMED BY ANY PERSON OR ENTITY, FOR ITSELF, EITHER BY AN EMPLOYEE OR EMPLOYEES EMPLOYED BY SUCH PERSON OR ENTITY WHO ARE ASSIGNED THE RESPONSIBILITY OF PERFORMING SUCH ASSESSMENT, AUDIT, OR REVIEW OR BY A CONSULTANT ENGAGED BY SUCH PERSON OR ENTITY EXPRESSLY AND SPECIFICALLY FOR THE PURPOSE OF PERFORMING SUCH ASSESSMENT, AUDIT, OR REVIEW TO DETERMINE WHETHER SUCH PERSON OR ENTITY IS IN COMPLIANCE WITH ENVIRONMENTAL LAWS. ONCE INITIATED, SUCH VOLUNTARY SELF-EVALUATION SHALL BE COMPLETED WITHIN A REASONABLE PERIOD OF TIME. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO AUTHORIZE UNINTERRUPTED VOLUNTARY SELF-EVALUATIONS.

(3) AN ENVIRONMENTAL AUDIT REPORT IS PRIVILEGED AND IS NOT ADMISSIBLE IN ANY LEGAL ACTION OR ADMINISTRATIVE PROCEEDING AND IS NOT SUBJECT TO ANY DISCOVERY PURSUANT TO THE RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, OR ADMINISTRATIVE PROCEDURE, UNLESS:

(a) THE ENTITY OR PERSON FOR WHOM THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED, WHETHER THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED BY THE ENTITY OR BY A CONSULTANT HIRED BY THE ENTITY, WAIVES THE PRIVILEGE UNDER THIS SECTION;

(b) (I) A COURT OF RECORD, OR, PURSUANT TO SECTION

24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT:

(A) THE ENVIRONMENTAL AUDIT REPORT SHOWS EVIDENCE THAT THE PERSON OR ENTITY FOR WHICH THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED IS NOT OR WAS NOT IN COMPLIANCE WITH AN ENVIRONMENTAL LAW; AND

(B) THE PERSON OR ENTITY DID NOT INITIATE APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WITH THE ENVIRONMENTAL LAW OR COMPLETE ANY NECESSARY PERMIT APPLICATION PROMPTLY AFTER THE NONCOMPLIANCE WITH THE ENVIRONMENTAL LAW WAS DISCOVERED AND, AS A RESULT, THE PERSON OR ENTITY DID NOT OR WILL NOT ACHIEVE COMPLIANCE WITH THE ENVIRONMENTAL LAW OR COMPLETE THE NECESSARY PERMIT APPLICATION WITHIN A REASONABLE AMOUNT OF TIME.

(II) FOR THE PURPOSES OF THIS PARAGRAPH (b) ONLY, IF THE EVIDENCE SHOWS NONCOMPLIANCE BY A PERSON OR ENTITY WITH MORE THAN ONE ENVIRONMENTAL LAW, THE PERSON OR ENTITY MAY DEMONSTRATE THAT APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WERE OR ARE BEING TAKEN BY INSTITUTING A COMPREHENSIVE PROGRAM THAT ESTABLISHES A PHASED SCHEDULE OF ACTIONS TO BE TAKEN TO BRING THE PERSON OR ENTITY INTO COMPLIANCE WITH ALL OF SUCH ENVIRONMENTAL LAWS.

(c) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT COMPELLING CIRCUMSTANCES EXIST THAT MAKE IT NECESSARY TO ADMIT THE ENVIRONMENTAL AUDIT REPORT INTO EVIDENCE OR THAT MAKE IT NECESSARY TO SUBJECT THE ENVIRONMENTAL AUDIT REPORT TO DISCOVERY PROCEDURES;

(d) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT THE PRIVILEGE IS BEING ASSERTED FOR A FRAUDULENT PURPOSE OR THAT THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED TO AVOID DISCLOSURE OF INFORMATION IN AN INVESTIGATIVE, ADMINISTRATIVE, OR JUDICIAL PROCEEDING THAT WAS UNDERWAY, THAT WAS IMMINENT, OR FOR WHICH THE ENTITY OR PERSON HAD BEEN PROVIDED WRITTEN NOTIFICATION THAT AN INVESTIGATION INTO A SPECIFIC VIOLATION HAD BEEN INITIATED; OR

(e) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT THE INFORMATION CONTAINED IN THE ENVIRONMENTAL AUDIT REPORT DEMONSTRATES A CLEAR, PRESENT, AND IMPENDING DANGER TO THE PUBLIC HEALTH OR THE ENVIRONMENT IN AREAS OUTSIDE OF THE FACILITY PROPERTY.

(4) THE SELF-EVALUATION PRIVILEGE CREATED BY THIS SECTION DOES NOT APPLY TO:

(a) DOCUMENTS OR INFORMATION REQUIRED TO BE DEVELOPED,

MAINTAINED, OR REPORTED PURSUANT TO ANY ENVIRONMENTAL LAW OR ANY OTHER LAW OR REGULATION;

(b) DOCUMENTS OR OTHER INFORMATION REQUIRED TO BE AVAILABLE OR FURNISHED TO A REGULATORY AGENCY PURSUANT TO ANY ENVIRONMENTAL LAW OR ANY OTHER LAW OR REGULATION;

(c) INFORMATION OBTAINED BY A REGULATORY AGENCY THROUGH OBSERVATION, SAMPLING, OR MONITORING;

(d) INFORMATION OBTAINED THROUGH ANY SOURCE INDEPENDENT OF THE ENVIRONMENTAL AUDIT REPORT OR ANY PERSON COVERED UNDER SECTION 13-90-107 (1) (j) (I) (A), C.R.S.;

(e) DOCUMENTS EXISTING PRIOR TO THE COMMENCEMENT OF AND INDEPENDENT OF THE VOLUNTARY SELF-EVALUATION;

(f) DOCUMENTS PREPARED SUBSEQUENT TO THE COMPLETION OF AND INDEPENDENT OF THE VOLUNTARY SELF-EVALUATION; OR

(g) ANY INFORMATION, NOT OTHERWISE PRIVILEGED, INCLUDING THE PRIVILEGE CREATED BY THIS SECTION, THAT IS DEVELOPED OR MAINTAINED IN THE COURSE OF REGULARLY CONDUCTED BUSINESS ACTIVITY OR REGULAR PRACTICE.

(5) (a) UPON A SHOWING BY ANY PARTY, BASED UPON INDEPENDENT KNOWLEDGE, THAT PROBABLE CAUSE EXISTS TO BELIEVE THAT AN EXCEPTION TO THE SELF-EVALUATION PRIVILEGE UNDER SUBSECTION (3) OF THIS SECTION IS APPLICABLE TO AN ENVIRONMENTAL AUDIT REPORT OR THAT THE PRIVILEGE DOES NOT APPLY TO THE ENVIRONMENTAL AUDIT REPORT PURSUANT TO THE PROVISIONS OF SUBSECTION (4) OF THIS SECTION, THEN A COURT OF RECORD OR, PURSUANT TO SECTION 24-4-105, C.R.S., ANY ADMINISTRATIVE LAW JUDGE, MAY ALLOW SUCH PARTY LIMITED ACCESS TO THE ENVIRONMENTAL AUDIT REPORT FOR THE PURPOSES OF AN IN CAMERA REVIEW ONLY. THE COURT OF RECORD OR THE ADMINISTRATIVE LAW JUDGE MAY GRANT SUCH LIMITED ACCESS TO ALL OR PART OF THE ENVIRONMENTAL AUDIT REPORT UNDER THE PROVISIONS OF THIS SUBSECTION (5) UPON SUCH CONDITIONS AS MAY BE NECESSARY TO PROTECT THE CONFIDENTIALITY OF THE ENVIRONMENTAL AUDIT REPORT. A MOVING PARTY WHO OBTAINS ACCESS TO AN ENVIRONMENTAL AUDIT REPORT PURSUANT TO THE PROVISIONS OF THIS SUBSECTION (5) MAY NOT DIVULGE ANY INFORMATION FROM THE REPORT EXCEPT AS SPECIFICALLY ALLOWED BY THE COURT OR ADMINISTRATIVE LAW JUDGE.

(b) (I) IF ANY PARTY DIVULGES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5) OR IF ANY OTHER PERSON OR ENTITY KNOWINGLY DIVULGES OR DISSEMINATES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT THAT WAS PROVIDED TO SUCH PERSON OR ENTITY IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5), SUCH PARTY OR OTHER PERSON OR ENTITY IS LIABLE FOR

ANY DAMAGES CAUSED BY THE DIVULGENCE OR DISSEMINATION OF THE INFORMATION THAT ARE INCURRED BY THE PERSON OR ENTITY FOR WHICH THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED.

(II) IF ANY PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL DIVULGES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5) OR KNOWINGLY DIVULGES OR DISSEMINATES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT THAT WAS PROVIDED TO SUCH PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5), SUCH PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL SHALL BE GUILTY OF A CLASS 1 MISDEMEANOR, MAY BE FOUND IN CONTEMPT OF COURT BY A COURT OF RECORD, AND MAY BE ASSESSED A PENALTY NOT TO EXCEED TEN THOUSAND DOLLARS BY A COURT OF RECORD OR AN ADMINISTRATIVE LAW JUDGE.

(6) NOTHING IN THIS SECTION LIMITS, WAIVES, OR ABROGATES THE SCOPE OR NATURE OF ANY STATUTORY OR COMMON-LAW PRIVILEGE.

(7) A PERSON OR ENTITY ASSERTING A VOLUNTARY SELF-EVALUATION PRIVILEGE HAS THE BURDEN OF PROVING A PRIMA FACIE CASE AS TO THE PRIVILEGE. A PARTY SEEKING DISCLOSURE OF AN ENVIRONMENTAL AUDIT REPORT HAS THE BURDEN OF PROVING THAT SUCH PRIVILEGE DOES NOT EXIST UNDER THIS SECTION.

(8) NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (3) OF THIS SECTION, THE EXISTENCE OF AN ENVIRONMENTAL AUDIT REPORT SHALL BE SUBJECT TO DISCOVERY PROCEEDINGS PURSUANT TO THE RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, OR ADMINISTRATIVE PROCEDURE; EXCEPT THAT THE CONTENTS OF SUCH A REPORT OR ANY OTHER PRIVILEGED INFORMATION CONTAINED THEREIN SHALL REMAIN CONFIDENTIAL.

(9) THIS SECTION APPLIES ONLY TO ALL VOLUNTARY SELF-EVALUATIONS THAT ARE PERFORMED DURING THE PERIOD BEGINNING ON THE EFFECTIVE DATE OF THIS ACT AND ENDING JUNE 30, 1999.

SECTION 2. 13-90-107 (1), Colorado Revised Statutes, 1987 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW PARAGRAPH to read:

13-90-107. Who may not testify without consent. (1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(j) (I) (A) IF ANY PERSON OR ENTITY PERFORMS A VOLUNTARY SELF-EVALUATION, THE PERSON, ANY OFFICER OR EMPLOYEE OF THE ENTITY OR PERSON INVOLVED WITH THE VOLUNTARY SELF-EVALUATION, IF A SPECIFIC RESPONSIBILITY OF SUCH EMPLOYEE WAS THE PERFORMANCE OF OR PARTICIPATION IN THE VOLUNTARY SELF-EVALUATION OR THE

PREPARATION OF THE ENVIRONMENTAL AUDIT REPORT, OR ANY CONSULTANT WHO IS HIRED FOR THE PURPOSE OF PERFORMING THE VOLUNTARY SELF-EVALUATION FOR THE PERSON OR ENTITY MAY NOT BE EXAMINED AS TO THE VOLUNTARY SELF-EVALUATION OR ENVIRONMENTAL AUDIT REPORT WITHOUT THE CONSENT OF THE PERSON OR ENTITY, OR UNLESS ORDERED TO DO SO BY ANY COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., BY AN ADMINISTRATIVE LAW JUDGE. FOR THE PURPOSES OF THIS PARAGRAPH (j), "VOLUNTARY SELF-EVALUATION" AND "ENVIRONMENTAL AUDIT REPORT" HAVE THE MEANINGS PROVIDED FOR THE TERMS IN SECTION 13-25-126.5 (2).

(B) THIS PARAGRAPH (j) DOES NOT APPLY IF THE VOLUNTARY SELF-EVALUATION IS SUBJECT TO AN EXCEPTION ALLOWING ADMISSION INTO EVIDENCE OR DISCOVERY PURSUANT TO THE PROVISIONS OF SECTION 13-25-126.5 (3) OR (4).

(II) THIS PARAGRAPH (j) APPLIES ONLY TO VOLUNTARY SELF-EVALUATIONS THAT ARE PERFORMED DURING THE PERIOD BEGINNING ON THE EFFECTIVE DATE OF THIS ACT AND ENDING JUNE 30, 1999.

SECTION 3. Part 1 of article 1 of title 25, Colorado Revised Statutes, 1989 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

25-1-114.5. Voluntary disclosure arising from self-evaluation - presumption against imposition of administrative, civil, or criminal penalties. (1) FOR THE PURPOSES OF THIS SECTION, A DISCLOSURE OF INFORMATION BY A PERSON OR ENTITY TO ANY DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH REGARDING ANY INFORMATION RELATED TO AN ENVIRONMENTAL LAW IS VOLUNTARY IF ALL OF THE FOLLOWING ARE TRUE:

(a) THE DISCLOSURE IS MADE PROMPTLY AFTER KNOWLEDGE OF THE INFORMATION DISCLOSED IS OBTAINED BY THE PERSON OR ENTITY;

(b) THE DISCLOSURE ARISES OUT OF A VOLUNTARY SELF-EVALUATION;

(c) THE PERSON OR ENTITY MAKING THE DISCLOSURE INITIATES THE APPROPRIATE EFFORT TO ACHIEVE COMPLIANCE, PURSUES COMPLIANCE WITH DUE DILIGENCE, AND CORRECTS THE NONCOMPLIANCE WITHIN TWO YEARS AFTER THE COMPLETION OF THE VOLUNTARY SELF-EVALUATION. WHERE SUCH EVIDENCE SHOWS THE NONCOMPLIANCE IS THE FAILURE TO OBTAIN A PERMIT, APPROPRIATE EFFORTS TO CORRECT THE NONCOMPLIANCE MAY BE DEMONSTRATED BY THE SUBMITTAL OF A COMPLETE PERMIT APPLICATION WITHIN A REASONABLE TIME.

(d) THE PERSON OR ENTITY MAKING THE DISCLOSURE COOPERATES WITH THE APPROPRIATE DIVISION OR AGENCY IN THE DEPARTMENT OF HEALTH REGARDING INVESTIGATION OF THE ISSUES IDENTIFIED IN THE DISCLOSURE.

(2) FOR THE PURPOSES OF PARAGRAPH (c) OF SUBSECTION (1) OF THIS SECTION, UPON APPLICATION TO AND AT THE DISCRETION OF THE DEPARTMENT OF HEALTH, THE TIME PERIOD WITHIN WHICH THE NONCOMPLIANCE IS REQUIRED TO BE CORRECTED MAY BE EXTENDED IF IT IS NOT PRACTICABLE TO CORRECT THE NONCOMPLIANCE WITHIN THE TWO-YEAR PERIOD. A REQUEST FOR A DE NOVO REVIEW OF THE DECISION OF THE DEPARTMENT OF HEALTH MAY BE MADE TO THE APPROPRIATE DISTRICT COURT OR ADMINISTRATIVE LAW JUDGE.

(3) IF A PERSON OR ENTITY IS REQUIRED TO MAKE A DISCLOSURE TO A DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH UNDER A SPECIFIC PERMIT CONDITION OR UNDER AN ORDER ISSUED BY THE DIVISION OR AGENCY, THEN THE DISCLOSURE IS NOT VOLUNTARY WITH RESPECT TO THAT DIVISION OR AGENCY.

(4) IF ANY PERSON OR ENTITY MAKES A VOLUNTARY DISCLOSURE OF AN ENVIRONMENTAL VIOLATION TO A DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH, THEN THERE IS A REBUTTABLE PRESUMPTION THAT THE DISCLOSURE IS VOLUNTARY AND THEREFORE THE PERSON OR ENTITY IS IMMUNE FROM ANY ADMINISTRATIVE AND CIVIL PENALTIES ASSOCIATED WITH THE ISSUES DISCLOSED AND IS IMMUNE FROM ANY CRIMINAL PENALTIES FOR NEGLIGENT ACTS ASSOCIATED WITH THE ISSUES DISCLOSED. THE PERSON OR ENTITY SHALL PROVIDE INFORMATION SUPPORTING ITS CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE DIVISION OR AGENCY.

(5) TO REBUT THE PRESUMPTION THAT A DISCLOSURE IS VOLUNTARY, THE APPROPRIATE DIVISION OR AGENCY SHALL SHOW TO THE SATISFACTION OF THE RESPECTIVE COMMISSION IN THE DEPARTMENT OF HEALTH OR THE STATE BOARD OF HEALTH, IF NO RESPECTIVE COMMISSION EXISTS, THAT THE DISCLOSURE WAS NOT VOLUNTARY BASED UPON THE FACTORS SET FORTH IN SUBSECTIONS (1), (2), AND (3) OF THIS SECTION. A DECISION BY THE COMMISSION OR THE STATE BOARD OF HEALTH, WHICHEVER IS APPROPRIATE, REGARDING THE VOLUNTARY NATURE OF A DISCLOSURE IS FINAL AGENCY ACTION. THE DIVISION OR AGENCY MAY NOT INCLUDE ANY ADMINISTRATIVE OR CIVIL PENALTY OR FINE OR ANY CRIMINAL PENALTY OR FINE FOR NEGLIGENT ACTS IN A NOTICE OF VIOLATION OR IN A CEASE AND DESIST ORDER ON ANY UNDERLYING ENVIRONMENTAL VIOLATION THAT IS ALLEGED ABSENT A FINDING BY THE RESPECTIVE COMMISSION OR THE STATE BOARD OF HEALTH THAT THE DIVISION OR AGENCY HAS REBUTTED THE PRESUMPTION OF VOLUNTARINESS OF THE DISCLOSURE. THE BURDEN TO REBUT THE PRESUMPTION OF VOLUNTARINESS IS ON THE DIVISION OR AGENCY.

(6) THE ELIMINATION OF ADMINISTRATIVE, CIVIL, OR CRIMINAL PENALTIES UNDER THIS SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR ADMINISTRATIVE LAW JUDGE TO HAVE COMMITTED SERIOUS VIOLATIONS THAT CONSTITUTE A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, REGULATIONS, PERMIT CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT AND THAT WERE DUE TO SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE VIOLATIONS, WITHIN THE THREE-YEAR PERIOD PRIOR

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TO THE DATE OF THE DISCLOSURE. SUCH A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS MAY ALSO BE DEMONSTRATED BY MULTIPLE SETTLEMENT AGREEMENTS RELATED TO SUBSTANTIALLY THE SAME ALLEGED VIOLATIONS CONCERNING SERIOUS INSTANCES OF NONCOMPLIANCE WITH ENVIRONMENTAL LAWS THAT OCCURRED WITHIN THE THREE-YEAR PERIOD IMMEDIATELY PRIOR TO THE DATE OF THE VOLUNTARY DISCLOSURE.

(7) EXCEPT AS SPECIFICALLY PROVIDED IN THIS SECTION, THIS SECTION DOES NOT AFFECT ANY AUTHORITY THE DEPARTMENT OF HEALTH HAS TO REQUIRE ANY ACTION ASSOCIATED WITH THE INFORMATION DISCLOSED IN ANY VOLUNTARY DISCLOSURE OF AN ENVIRONMENTAL VIOLATION.

(8) UNLESS THE CONTEXT OTHERWISE REQUIRES, THE DEFINITIONS CONTAINED IN SECTION 13-25-126.5 (2), C.R.S., APPLY TO THIS SECTION.

(9) THIS SECTION APPLIES ONLY TO VOLUNTARY DISCLOSURES THAT ARE MADE AND VOLUNTARY SELF-EVALUATIONS THAT ARE PERFORMED DURING THE PERIOD BEGINNING ON THE EFFECTIVE DATE OF THIS ACT AND ENDING JUNE 30, 1999.

SECTION 4. Effective date - applicability. This act shall take effect upon passage and shall apply to all legal actions and administrative proceedings commenced on or after said date.

SECTION 5. No appropriation. The general assembly has determined that this act can be implemented within existing appropriations, and therefore no separate appropriation of state moneys is necessary to carry out the purposes of this act.

SECTION 6. Safety clause. The general assembly hereby

finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Tom Norton
PRESIDENT OF
THE SENATE

Charles E. Berry
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Joan M. Albi
SECRETARY OF
THE SENATE

Judith M. Rodrigue
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED June 1, 1994 at 1:28 p.m.

Roy Romer
GOVERNOR OF THE STATE OF COLORADO

Summaries of Case Histories

CASE 1

In this case, a supervisor and two employees under his supervision at Chem Waste's Chicago Incinerator improperly relabeled a number of drums at the facility in order to avoid a Consent Order requirement to reduce the inventory of drums on site to a specified amount. The supervisor also kept two sets of books to record the inventory both in an accurate and a doctored fashion.

Chem Waste has a comprehensive compliance management system, which includes a policy requiring employees to report all instances of suspected noncompliance, as well as a Hotline. Chem Waste discovered the mislabeling four months after the incident when one of the two employees reported the incident to the facility manager, consistent with the company's compliance policy. The company investigated and reported the matter to the state within two days. The violations dealt with mislabeling only, caused no harm or threat of harm to public health or the environment, and the underlying problem had already been remedied by the company through reductions in inventories. The company also terminated the supervisor, took disciplinary actions against the two employees, and overhauled its procedures to prevent recurrence of the problem.

With the company's assistance, the state took criminal action against the supervisor, and he was subsequently convicted. The state investigated whether to bring criminal charges against the company because of the amount of time it took to report the incident, two days, but decided not to bring an action.

At the time of the incident, the company had good reason to believe that it was close to receiving approval from EPA and the state for a resumption of operations following extensive repairs to the incinerator necessitated by a prior explosion. Instead, the state presented the company with new permitting obstacles and a series of fines, which the company paid, totaling about S2.5–3 million dollars. Just under $1.5 million of the total was for the mislabeling incident alone. The incinerator is still not operational, nearly 150 employees have lost their jobs, the company has lost tens of millions of dollars in revenue, and Illinois has lost considerable RCRA and TSCA capacity.

CASE 2

Chem Waste has a comprehensive compliance management system, which includes a policy requiring employees to report all instances of suspected noncompliance, as well as a Hotline. An employee report to her supervisor, consistent with the company's compliance policy, alerted Chem Waste that a lab pack inspector at its incinerator facility near St. Louis had falsely filled out lab pack inspection forms when actual inspections had not been conducted. The company reported the matter to the state and agreed not to engage in any further investigation without state approval and to quarantine the lab packs under suspicion. Three days after the incident, the company followed up with the state to see if the state wanted to be present for interviews the company was planning to conduct. The state declined and just asked for a final report of the investigation within two weeks. A report was prepared and submitted.

The company terminated the inspector, instituted a daily audit to ensure proper inspections, and reinspected the quarantined containers. All of the lab packs were found to be acceptable for incineration, and the falsification of records did not cause any harm or threat of harm to public health or the environment. Prior to the falsification incident, the facility had been working under a new set of operating guidelines. The state had indicated that enforcement discretion would be exercised for any exceedances if the company was making substantial progress toward improving its operating systems and given that implementation of the new guidelines would take some time.

Following report of the lab pack matter, however, the state indicated that not only the lab pack matter, but all other operating exceedances that had been self-reported by the company, would be the subject of an enforcement action. EPA threatened to over file if the state did not file an action seeking significant penalties and strongly urged the state to file promptly so the action could be announced to the media as part of its Combustion Strategy. The state promptly filed an enforcement action, asking that the facility be shut down until operating issues are corrected. The state is presently demanding S3.5 million as a fine and $600,000 in contributions towards environmentally beneficial projects. This is true even though the state freely admits that the site's operating history has improved substantially. The state is seeking $1.5 million for the lab pack issue alone. The state is unwilling to provide any credit

to the company for its self-disclosure on either the lab pack issue or the other self-reported exceedances.

CASE 3

This case involves Waste Management Inc.'s acceptance of 38,000 tons of solid waste in excess of its permit limitations at its Lake View Landfill in Pennsylvania. In order to conceal the excess, several employees created inaccurate state agency and company-required records. No environmental harm resulted from the acceptance of excess volume. As soon as the company discovered the violation less than a month later, it promptly conducted an exhaustive internal investigation, voluntarily disclosed the information to the state agency, cooperated fully with the subsequent state investigation, terminated five employees, and developed corrective changes to its solid waste control.

Following the state's investigation, the state demanded, and the company paid, $3,831,900 under a statute that provides for a mandatory fine of a least $100 per ton for excess waste. Under a statute that provides for a variety of discretionary penalties for recordkeeping violations, the state demanded an additional $4.1 million for the violation. Only after the initial assessment and negotiations was the company given credit for its voluntary disclosure and the discretionary penalty reduced to approximately $300,000.

CASE 4

In this case, early in the RCRA Land Disposal Restrictions program, a Chem Waste landfill mistakenly disposed of five loads of waste without first performing the necessary treatment. Through an internal review, the company discovered the mistakes, immediately exhumed the waste at a cost of $250,000 to the company, promptly treated it, tested it and re-disposed it. The company also enhanced its procedures to prevent recurrence. No harm occurred due to the disposal. EPA was notified about one month after re-disposal.

EPA demanded a penalty of $123,750 for the five instances. The state also demanded $15,000 for the fifth violation. The company paid almost all of the penalties assessed, which were the maximum penalties available to EPA and the state. Neither EPA nor the state was willing to give the company any credit for its voluntary disclosure, correction, improvements or cooperation.

CASE 5

At one of its transfer stations, Chem Waste received a load of drums characterized by the generator as waste water. The customer mistakenly included three drums of PCB waste, but this was not detected because there was no standard operating practice to test waste water for PCBs at that facility. Some of the load was sent to a Chem Waste disposal facility where it was processed and disposed of without analysis, and some was sent to another outlet.

One month later, Chem Waste learned that the load might have contained PCBs. The company confirmed the presence of PCBs and informed EPA and the state immediately. Working with EPA, the company carried out extensive decontamination of tanks and equipment at the Chem Waste facilities as well as the other outlet's facility. The cost of this was over $1.5 million. The company also voluntarily amended its testing protocol to provide that all newly received waste will be tested for PCBs. The cost to the company is $3,000 a month. After all this, EPA assessed penalties against Chem Waste for $319,000 and against the customer for $87,000.

CASE 6

A Chem Waste transfer and processing facility received a load of waste which had not been manifested as containing PCBs, but which the company discovered contained PCBs at regulated levels. The incident was reported to EPA. One month later, the same facility received four drums of PCBs, also unmanifested as PCBs. This time a sampler's labeling error caused the PCB material to be accepted by the facility. The mistake was reported to EPA the next day, and a full written report was sent.

With EPA involvement, Chem Waste decontaminated all tanks and equipment and sent all PCB materials for incineration. The cost to the company was about $100,000. The company also discharged several employees, and instituted new laboratory procedures to prevent recurrence. EPA subsequently assessed a penalty of $90,000.

CASE 7

This case involves a company with a voluntary above ground tank inspection policy. Although some tanks were required to be inspected annually due to permit or regulatory requirements, many tanks were voluntarily inspected on an annual basis by the company even though there were no mandatory inspection requirements. During one annual inspection, two tanks were found to have problems. Neither of these tanks had mandatory inspection requirements. The problems were reported to the state, and corrective action was planned and performed.

The state then instituted corrective action, performed a non-routine inspection, and assessed a penalty of over $90,000 for the two identified problems. The fine was negotiated down to $27,000, which included additional violations that were identified during the non-routine inspection. The state refused to abate or mitigate based on the voluntary audit program and voluntary reporting. Subsequently, the company discontinued its voluntary auditing and inspection of tanks.

CASE 8

As part of a plant's voluntary program to reduce emissions, 4.5 million dollars was spent to install a tank farm vapor recovery system and to upgrade containment areas. Everything was put into operation according to the terms of the air permit, except for the closed loop unloading system. The closed loop system represented only 2% of the total emissions reduction and was overlooked for less than 180 days due to changes in personnel.

A self-assessment revealed the problem, and the system was put into operation immediately. The company reported the delay to the state agency. As a result of the self-disclosure, the agency threatened the company with a fine of $660,000, which was levied at $28,300 and negotiated down to $23,300.

This case involves a company with an excellent compliance record that is recognized as an environmental leader and has received awards for environmental excellence. The company's enthusiasm for future voluntary action has been significantly dampened by this experience.

Mr. GEKAS. Without objection, all your prepared statements would be accepted for the record.

And now we will listen to Mr. Stanga.

STATEMENT OF MARK V. STANGA, ENVIRONMENTAL AFFAIRS COUNSEL, LITTON INDUSTRIES, INC.

Mr. STANGA. Thank you, Mr. Chairman. My name is Mark Stanga. I am environmental affairs counsel for Litton Industries. I have prepared a written statement which I will request the committee enter into the record.

Mr. GEKAS. Without objection, it is so ordered.

Mr. STANGA. Thank you, Mr. Chairman. I will summarize that statement briefly for the committee.

I am appearing today on behalf of the Electronic Industries Association, and the Electronic Industries Association very strongly supports H.R. 1047. We believe that H.R. 1047 will encourage more environmental auditing. We believe that the result of that will be an increase in the overall compliance rates with environmental requirements and a concomitant improvement in environmental quality.

EPA has had a policy of encouraging environmental audits since 1986. However, EPA's enforcement policies and practices have, in fact, created obstacles to environmental audits during that time. The significance of H.R. 1047 is that it would correct that problem and it would, in fact, address the two most significant obstacles that result from environmental enforcement policies right now and impede the conduct of more environmental audits.

Environmental auditing, which has increased in the last several years, is a direct response to the increasing complexity and perva-

siveness of environmental requirements, which the other witnesses have mentioned already this morning. Environmental auditing is voluntary. There are no State or Federal laws that require companies to engage in environmental audits.

Environmental auditing also is expensive. Many companies spend hundreds of thousands of dollars every year on their voluntary environmental audit compliance efforts. Those programs are always an important element of a company's environmental compliance programs. At Litton, my company, our environmental auditing program is the single most important aspect of our corporate environmental program.

The Litton environmental review program is a program which is similar to environmental auditing programs that are operated in many electronics manufacturing companies. We conduct annual site visits at over 30 facilities in 20 States and provinces.

Mr. GEKAS. You do what?

Mr. STANGA. Site visits, environmental audits at the sites of the particular electronics manufacturing facilities.

Corporate auditors manage the teams that conduct these environmental audits and each corporate audit team is headed by an in-house environmental lawyer.

In fact, I conduct about 15 environmental audits for my company every year. I was conducting one last week in Halifax, Nova Scotia, at one of our Canadian facilities. At the end of each audit, I write a report that includes a list of action items, and we audit to compliance with corporate environmental standards and policies and principles as well as to environmental statutory and regulatory compliance requirements.

The action items require the facility to develop a schedule that then demonstrates their timetable to get into compliance and we follow up with a visit from corporate auditors again several months later to assure that those steps are taken.

We take serious enforcement risks by running an environmental auditing program, and we took those risks on voluntarily after considering them to a great extent in our company when we considered developing our program. Unfortunately, these risks discourage many companies from starting environmental auditing programs, especially medium-sized and smaller companies.

The first obstacle to auditing that exists right now is EPA's use of audit reports as evidence of noncompliance. Companies like Litton attempt to develop their programs to take advantage of the attorney-client privilege, the attorney's work product doctrine, and other evidentiary doctrines to keep their audit items confidential, but too often those efforts are not successful and courts wind up allowing the disclosure of those documents.

So what happens is companies are faced with this prospect. They try to go beyond environmental compliance requirements by establishing an environmental auditing program. In the course of doing that, they create voluntarily audit records that sometimes document noncompliance at the facility and EPA punishes them with fines. The result, obviously, must be less auditing than otherwise might occur.

The second obstacle to auditing right now is EPA's assessment of large penalties against companies that find violations in their

audits and voluntary disclosure. There are many examples of this in different industry sectors. I want to mention briefly three in the electronics sector.

In 1993, the Intel Corp. installed a new boiler at its Rio Rancho, NM, facility. When they completed installation, for which they had received a permit to install from the New Mexico Environmental Improvement Agency beforehand, they realized they installed it 300 yards away from where the permit said it was to be. They immediately notified the State agency. They corrected the permit and then the State fined them $35,000 for that self-disclosed violation.

In my company I was doing an environmental audit at Litton's Kester Solder Division in Des Plaines, IL, about 3 years ago. In the course of doing the audit, I discovered a paperwork violation of the Toxic Substances Control Act. We turned that in immediately to EPA. We corrected the problem immediately. And the agency fined us $45,500 for that.

The other example I would offer to you is one that occurred at AT&T in 1986. AT&T located a similar violation of the Toxic Substances Control Act to the one I have just mentioned to you themselves. EPA didn't find it. AT&T corrected it and reported it appropriately to EPA. They received a $1 million fine for this self-disclosed violation.

Companies that consider starting environmental audit programs also must consider this. If they audit and they find violations and report them, they will certainly pay large fines. If they don't audit, the violation might never surface. The result obviously is likely to be less auditing.

H.R. 1047 follows the lead of 14 States that have enacted environmental audit privilege or privileges and voluntary disclosure laws to address these enforcement obstacles. This approach is based on a different approach to improving environmental compliance than the traditional EPA enforcement approach. EPA believes the best way to improve compliance rates overall is to maintain a constant threat of onerous enforcement for every violation of which the agency learns.

Instead of maintaining threats to discourage noncompliance, H.R. 1047 would encourage companies to comply by offering inducements for companies to police themselves through environmental auditing. The EIA believes the positive approach to improving environmental compliance embodied in H.R. 1047 is vastly superior to existing punitive enforcement policies and we strongly encourage the committee to act promptly on H.R. 1047.

We appreciate the chance to present our views to the committee today. I will be pleased to answer any questions at the end of the panel.

[The prepared statement of Mr. Stanga follows:]

PREPARED STATEMENT OF MARK V. STANGA, ENVIRONMENTAL AFFAIRS COUNSEL, LITTON INDUSTRIES, INC.

My name is Mark Stanga. I am Environmental Affairs Counsel for Litton Industries, Inc., and I am testifying today on behalf of the Electronic Industries Association (EIA) in support of H.R. 1047, the Voluntary Environmental Self-Evaluation Act. The EIA strongly advocates this legislation because we believe it will encourage more companies to conduct environmental audits, resulting in increased environmental compliance rates and improved environmental quality.

The EIA is the oldest and largest trade association for the U.S. electronics industry, with more than 1200 member companies representing over 85 per cent of the electronics industry. EIA member companies represent the full spectrum of U.S. manufacturers in the $342.7 billion a year electronic industry. EIA members design, manufacture, and market products from the smallest electronic parts to the most complex systems used in defense, space, communication, industrial and consumer markets. Litton is a leader in worldwide technology markets for advanced electronic and defense systems, and a major designer and builder of surface combatant ships for the U. S. Navy and allied nations.

The electronics industry has a history of exceeding applicable environmental requirements, and developing innovative approaches to reducing the environmental impacts of its operations. Many electronics companies eliminated use of ozone-depleting compounds from their manufacturing processes in the early 1990s, and numerous electronics manufacturers participated in the Environmental Protection Agency's (EPA) Voluntary Toxics Use Reduction Program (the "33/50 Program"), in which participants set a goal of reducing emissions of seventeen target pollutants by at least 50 per cent over a specified period.

Litton and other electronics companies signed up for EPA's Compliance Audit Program under Section 8(e) of the Toxic Substances Control Act, agreeing to conduct voluntary audits of company records to locate information suggesting that chemicals present substantial risks to humans or the environment. The EIA presently is participating in EPA's Common Sense Initiative, a joint industry and EPA effort with the goal of developing better, more cost-effective ways to achieve environmental compliance.

ENVIRONMENTAL AUDITING OVERVIEW

A key area in which the electronics industry goes beyond compliance with environmental requirements is in the conduct of routine environmental compliance audits by many of its members. H.R. 1047 defines "voluntary environmental self-evaluation" in Sec. 3.(6) as "an assessment, audit, investigation or review that is: (A) initiated by a person or entity; (B) carried out by the person or entity, for the express purpose of carrying out the assessment, audit, or review; and (C) carried out to determine whether the person or entity is in compliance with federal environmental laws (including any permit issued under a federal environmental law)." Simply put, environmental audits are periodic reviews of a facility's compliance status with applicable environmental requirements.

Because there are no mandatory requirements for the structure or elements of an environmental auditing program,[1] the scope and content of these programs varies from organization to organization. Companies typically tailor their environmental audit program to operate effectively in their unique corporate structure. Some environmental auditing programs rely on quantitative evaluations, numerically scoring the audited facility's environmental performance, while other programs rely on qualitative analyses that evaluate performance in narrative discussions ofthe facility's compliance status in audited subject matter areas.

The scope of environmental audit programs varies by organization, but most programs examine federal, state and local environmental requirements. Some companies establish a uniform audit frequency for all facilities in the organization, and other programs increase audit frequency for facilities with more significant environmental impacts.

Some organizations retain consultants or attorneys to conduct environmental audits. Other organizations, especially larger ones, use their own employees to conduct the audits. Some environmental auditing programs include audit results in the performance evaluations of the organization's environmental managers.

Litton's Environmental Review Program is typical of environmental auditing programs in the electronics industry. It includes the following principal elements. Litton conducts annual environmental audits at virtually all of its U.S. and Canadian manufacturing facilities (approximately 34 facilities in twenty states and provinces).

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[1] In 1986 EPA issued an Environmental Auditing Policy Statement that made it the Agency's policy to encourage regulated entities to use environmental audits to help achieve and maintain compliance with environmental requirements. 51 *Fed. Reg. 25,004* (July 9, 1986). The Appendix to the Policy offered the following seven elements of an effective environmental auditing system: (1) explicit top management support for the program and a commitment to follow up on findings: (2) environmental auditing function independent of audited activities; (3) adequate team staffing and auditor training; (4) explicit audit program objectives. scope, resources and frequency; (5) a process sufficient to achieve audit objectives: (6) specific procedures to promptly prepare written audit findings, corrective action plans. and implementation schedules: and, (7) quality assurance procedures to assure audit accuracy and thoroughness

Litton uses trained corporate auditing teams that are headed by an in-house environmental attorney and include an environmental compliance specialist to conduct its reviews.

Litton's review reports include a qualitative analysis of each facility's compliance with applicable federal, state or provincial, and local environmental requirements, as well as with corporate environmental policies. The report includes a list of action items. Each audited facility must submit an implementation schedule to the Litton Corporate Director of Environmental Affairs within thirty days of the site visit. After the Director of Environmental Affairs reviews and approves or modifies the schedule, the facility implements it. Six months later a corporate review team member conducts a follow-up visit to assure that the facility completed all of the action items. Litton initiated its Environmental Review Program in 1991, and the program is now in the third round of reviews.

OBSTACLES THAT DISCOURAGE ENVIRONMENTAL AUDITING

No federal or state laws require companies to conduct environmental audits. Companies that conduct environmental audits undertake a voluntary effort to improve their environmental compliance status. Presently, two major obstacles discourage additional companies from starting environmental auditing programs. These two factors also punish companies that already operate environmental auditing programs by subjecting them to additional enforcement risks due solely to the fact that they conduct environmental audits.

The first obstacle that discourages environmental auditing is EPA's practice of seeking environmental audit reports and attempting to use them as evidence of noncompliance in enforcement proceedings. The fear that this will happen to a company that conducts environmental audits is well-founded. A recent study of environmental auditing practices indicated that nine per cent of respondents had environmental audit findings involuntarily discovered or disclosed.[2]

EPA's enforcement staff has candidly stated that they will try to obtain environmental audit documents for use as evidence of violations in enforcement proceedings.[3] EPA's recently published Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement notes that the Agency will not request environmental audit reports to "trigger" civil or criminal investigations. 60 *Fed. Reg.* 16,878 (April 3, 1995). However, the Interim Policy states that "[o]nce the Agency has reason to believe a violation has been committed, EPA may seek through an investigation or enforcement action any information relevant to identifying violations or determining liability or extent of harm." *Id.* This obviously means that EPA will continue to seek environmental audit reports in the normal evidence gathering process for enforcement cases.

The result of EPA's practice of seeking a company's environmental audit reports as evidence of violations almost certainly discourages companies, especially smaller- and medium-sized companies, from starting environmental auditing programs that will document environmental noncompliance.

The possibility that a regulatory agency will try to use an environmental audit report as evidence of violations also affects the behavior of companies that already have initiated environmental auditing programs. In an effort to insulate audit documents from discovery, Litton and many other companies attempt to design their auditing programs to take advantage of the attorney-client privilege and the attorney's work product doctrine, and the emerging self-evaluation privilege in the common law of evidence.[4] Although some courts have recognized the applicability of the self-evaluation privilege to environmental audit reports,[5] other courts have declined to

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[2] "The Voluntary Environmental Audit Survey of U.S. Business," Price Waterhouse LLP, March 1995. Executive Summary at 5.

[3] "[W]e have obtained [environmental] audits by subpoena in criminal cases. Typically this is where a company did an audit, found out they had a problem. and didn't do anything about it. You bet we went after the audit because it proved our case." Earl Devaney, Director of EPA's Office of Criminal Enforcement. BNA National Environment Daily, March 11, 1991.

[4] This privilege originated as a judge-made doctrine to establish a qualified protection for frank self-evaluation by a company of its practices. The seminal case on the self-evaluation privilege, *Bredice* v. *Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem.*, 179 F.2d 920 (D.C. Cir. 1973). was a medical malpractice suit in which the plaintiff sought to discover minutes and reports of the defendant hospital's staff. The court noted that "candid and conscientious evaluation of clinical practices" was essential to adequate hospital care, and found that "overwhelming public interest" required that the self-evaluation materials in question be entitled to a qualified privilege from discovery. *Id.* at 250–51.

[5] *Reichold Chemicals, Inc.* v. *Ashland Oil, Inc.*. Case. No. 92–30393–RV. slip op. at 11–12 (N.D. Fla., filed September 20, 1994) (*tracing the evolution of the self-critical analysis privilege and collecting cases*).

recognize the self-evaluation privilege in the context of environmental audit documents.[6]

In response tc the uncertainty regarding the admissibility of environmental audit reports into evidence, fourteen states have enacted environmental audit privilege statutes beginning with Oregon in July 1993.[7] These statutes provide some encouragement for companies in those states to begin environmental auditing programs, and for companies already operating auditing programs to retain them. However, the state environmental audit privilege statutes apply only to state enforcement proceedings, and have no effect on the admissibility of audit reports in federal enforcement proceedings. Consequently, companies that conduct environmental audits in states with privilege statutes still must contend with the possibility that EPA will seek environmental audit reports and attempt to use them as evidence in federal enforcement proceedings despite the inadmissibility of the document in state court. Until federal environmental audit report protection is provided to parallel state evidentiary safeguards, some companies will be discouraged from starting environmental auditing programs in those states.

The second obstacle that discourages environmental auditing is EPA's practice of penalizing companies that discover environmental noncompliance in an environmental audit and report the violation to the Agency. This practice has a particularly chilling effect on companies that are considering whether to initiate an environmental auditing program, because the resulting fines for self-disclosed violations often are substantial.

Numerous examples of this EPA practice exist in the electronics industry. In 1993, Intel Corp. obtained a permit from the New Mexico Environmental Improvement Agency to install eight boilers at a manufacturing facility in Rio Rancho, New Mexico. After Intel installed the new boilers, it realized that it had installed one of the boilers in a location that was 300 yards away from the location specified in the permit. Intel reported the mistake to the Environmental Improvement Agency and did not operate the boiler until it received a corrected installation permit. The Environmental Improvement Agency fined Intel $35,000 for this self-reported matter.

In an environmental audit that Litton conducted at its Kester Solder Division in Des Plaines, Illinois, the auditors discovered that Kester Solder had on several occasions imported a chemical substance that was not on the Inventory of chemical substances that EPA maintains under Section 8(b) of the Toxic Substances Control Act (TSCA).[8] Litton immediately reported this matter to EPA, and filed the appropriate documents under TSCA with the Agency. EPA proposed to fine Kester Solder $91,000 for TSCA paperwork violations associated with this matter. EPA adjusted the civil penalty to $45,500 under its TSCA civil penalty policy because Kester promptly disclosed and corrected the violation.[9]

In 1986 AT&T discovered that it had imported chemicals to its Staten Island, New York facility that were not on the TSCA Inventory. AT&T voluntarily told EPA about the violations, and the Agency assessed a $1 million civil penalty relating to the related to the self-reported violations.

These cases demonstrate the most difficult reality for companies to face if they start an environmental auditing program. If a company conducts environmental audits, it does so with the knowledge that any violations it finds and reports to regulators almost certainly will result in large fines, even after they are reduced for voluntary reporting. For medium- and small-sized companies contemplating an environmental auditing program, EPA's punitive enforcement response history for self-reported violations presents a difficult dilemma: if the company audits, it almost certainly will find violations that could results in fines; if the company decides not to audit, its small size makes it unlikely that EPA ever will inspection it, so any violations are unlikely to be detected or to be the subject of a fine. Under these cir-

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[6] *See cases cited at 7–8, Reichold Chemicals, Inc.* v. *Ashland Oil, Inc., supra. See also Ohio* v. *CECOS International, Inc.*, 583 N.E.2d 1118 (Ohio Ct. App. 1990). in which the court acknowledged its authority to recognize a self-evaluation privilege for environmental audit reports. Although it recognized that the discovery of environmental audit reports could have a "chilling effect" on internal corporate environmental compliance activities, the court declined to recognize the privilege. 583 N.E.2d at 1121.

[7] The other thirteen states are: Arkansas; Colorado; Idaho; Illinois; Indiana; Kansas; Kentucky; Minnesota; Mississippi; Texas; Utah; Virginia; and Wyoming.

[8] 15 U.S.C. § 2607(b).

[9] Some of EPA's civil penalty policies, including the TSCA Section 5 Civil Penalty Policy, (August 5, 1988, revised June 8, 1989), and the Interim Policy on Voluntary Environmental Self-Policing and Self-Disclosure, *supra*, provide for possible reductions in civil penalties when companies promptly self-report violations. However, the penalty amount remaining after the reduction still may be quite large.

cumstances, many companies may decide not to conduct environmental audits. In a recent survey on environmental auditing, two thirds of respondents that presently conduct environmental audit stated that the most important factor to encourage more environmental audits would be enforcement policies that eliminated penalties for self-identified, reported and corrected items.[10]

As they have done in the case of recognizing the need for an environmental audit evidentiary privilege, a number of states have enacted "voluntary disclosure" statutes that create a presumption against any penalties for companies who self-report and promptly correct environmental noncompliance, starting with Colorado in June 1994.[11] As is the case with the state environmental audit report privilege statutes, the protection afforded by the state voluntary disclosure statutes is limited to state enforcement proceedings. Even if state regulators are impeded from bringing enforcement action for a self-reported matter, EPA is not similarly constrained and may "over file" a federal enforcement case for the same set of facts that are not subject to state penalties. This fact is enough to discourage companies from starting environmental audit programs, even in states with voluntary disclosure statutes.

H.R. 1047 WOULD ELIMINATE THE OBSTACLES THAT DISCOURAGE COMPANIES FROM CONDUCTING ENVIRONMENTAL AUDITS

H.R. 1047 would eliminate the two identified obstacles to increased environmental auditing levels. This legislation would follow the lead of the fourteen states that have recognized that positive inducements are a more effective means of increasing environmental compliance than continuing to fine companies heavily that go beyond compliance by operating environmental auditing programs.

This legislation would establish a qualified evidentiary privilege for environmental audit reports and related documents, and for the testimony of the auditor. This provision, which parallels the state privilege statutes, would squarely address companies' fear that their environmental audit reports will be used as evidence against them in enforcement proceedings. This provision includes safeguards to prevent misuse of the privilege. An entity cannot assert the privilege unless it has promptly corrected the violations that the environmental audit report documents. An entity cannot assert the privilege fraudulently to insulate a document from discovery. Finally, the privilege does not apply to documents that the environmental statutes require to be made available to the government. These safeguards will prevent improper application of the evidentiary privilege.

H.R. 1047 also would eliminate the second major obstacle that discourages companies from starting environmental auditing programs, EPA's practice of imposing substantial fines for self-reported violations. In this regard, H.R. 1047 would ratify the conclusion embodied in the eight state voluntary disclosure statutes.

The voluntary disclosure of H.R. 1047 creates a presumption against any civil or criminal fine or penalty being imposed against an entity that discovers environmental noncompliance in an environmental audit, reports it to the relevant regulatory authorities, and promptly corrects the noncompliance. The presumption against fines or penalties does not apply to "involuntary disclosures" under Sec. 6.(B) of the bill. This provision disqualifies entities that have been adjudged to have committed a pattern of significant environmental violations during the three-year period before the disclosure.

A federal voluntary disclosure statute will be an extremely strong inducement for companies that do not now conduct environmental audits to begin auditing programs. Companies will have much to gain and little to lose by starting or continuing environmental auditing programs—they will be able to eliminate environmental noncompliance without the risk of being the recipient of a crushing penalty imposed at the discretion of EPA.

If H.R. 1047 is enacted, entities would foolish not to begin environmental auditing programs because they will risk the full brunt of EPA's enforcement authorities, which presumably would be arrayed primarily against entities that persist in not initiating environmental auditing programs.

CONCLUSION

Effective environmental auditing typically is more probing and thorough than a regulatory compliance inspection, and therefore is likely to uncover more instances of environmental noncompliance than an inspection. Because government environ-

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[10] "The Voluntary Environmental Audit Survey of U.S. Business," Price Waterhouse LLP, March 1995, Executive Summary at 6.

[11] The other seven states with voluntary disclosure statutes are: Idaho; Kansas; Minnesota; Mississippi; Texas; Virginia; and Wyoming.

mental inspection resources are limited, environmental auditing will reach many facilities that inspectors never will visit. Assuming that the audited facilities act on audit finding to correct environmental noncompliance, increased environmental auditing will result in increased compliance with environmental requirements, and in improved environmental quality. H.R. 1047 would encourage more companies to conduct environmental audits by removing two key obstacles that discourage environmental auditing, both of which are current EPA enforcement policies. H.R. 1047 would not change any substantive environmental requirements.

H.R. 1047 represents an alternative approach to EPA's traditional environmental enforcement philosophy. Instead of relying on threats of onerous fines and penalties to increase environmental compliance rates, this bill allows regulated entities to police themselves, based on the premises that they can do so more effectively than regulators, and that encouragement rather than punishment will be a more effective way to increase environmental compliance rates. For these reasons, we strongly urge the Subcommittee to take prompt action to approve H.R. 1047.

The EIA and Litton thank the Subcommittee for the opportunity to testify in support of H.R. 1047.

Mr. GEKAS. We thank the gentleman and now turn to Mr. Leibowitz.

STATEMENT OF ALAN J. LEIBOWITZ, DIRECTOR, ENVIRONMENTAL HEALTH AND SAFETY, ITT DEFENSE & ELECTRONICS CORP.

Mr. LEIBOWITZ. Yes, good morning. And thank you, Mr. Chairman for allowing me to come before the subcommittee today to testify about the need for H.R. 1047, the Voluntary Environmental Self-Evaluation Act.

This is very important legislation because of its potential to improve regulatory compliance and environmental conditions and I commend the committee for holding this hearing. The Voluntary Self-Evaluation Act is an important piece of legislation because of the nature of its ability to help companies like ITT to improve and move forward with their environmental assessment program.

ITT believes a comprehensive environmental audit program is an essential part of a responsible environmental management program. In the absence of any regulatory requirements to conduct such audits, facilities should be given every reasonable incentive to evaluate their operations and make required corrections.

As I have stated, my name is Alan Leibowitz. I am director of environmental health and safety for ITT's defense and electronics organization. I also chair the Electronics Industry Association's Environmental Issues Council and have recently authored or edited a book on auditing for the American Industrial Hygiene Association.

Audit principles are essential to any environmental management program but they are only useful when they are conducted in an atmosphere of candor and full disclosure. As has been mentioned briefly here, one of the big issues we face in developing these types of audits is the necessity on occasion to use legal methods to avoid presenting ourselves in a negative fashion. ITT, for example, has been very careful to make sure that we can have as broad a distribution of our reports as possible, and that at times conflicts with our ability to ensure full legal protection.

That candor, though, is important in making sure those people who can actually effect the changes that are necessary within an organization can be done. ITT, for example, following our audit, requires that all facilities complete audit action plans, and those audit action plans are very explicit in the nature of the things that

are wrong and the things that must be corrected. Those are done at risk and present us with some cognitive dissidents when you have management, who wants to do the right thing but feels very uncomfortable with baring their souls in the nature of trying to move forward.

Our program began in 1987, when I presented to my general manager at the time a desire to investigate our properties and operations in a fashion that would enable us to know what our full responsibilities and liabilities might exist in this area. He had long been a supporter of environmental issues, but sat back for a minute and said, now you are asking me to accept unquantified risk. And that was a difficult decision. We have chosen to move forward but that decision was made all the more unpalatable because of the knowledge that we could potentially face fines in addition to having to correct whatever instances of noncompliance we found.

Voluntary disclosure does encourage compliance. ITT has participated in the CAP program offered under the EPA, TSCA, ADP program. We recently also enacted in Indiana, under the Clean Air Act program, with the regulators that set caps on the amount of fines that could be levied for violation that were discovered. These actions encouraged us to make a much more thorough evaluation of those particular areas because we knew that where we could bring those things forward, we would be able to disclose them without fear of fines, in addition to having to correct the problems.

Critics of this program have described it as potentially encouraging bad actors. And I come to you today as a representative of ITT to state that we have a very strong environmental enforcement program and we are very proud of it. Our auditing program lab, used as an example for many corporations around the country, and I do truly believe it is world class, but we have had examples from our auditing program that have given us pause, and each year I am forced to bring forward to my management examples of where we not only had to correct problems, but had to pay fines on top of the addressing issues we voluntarily reported, and I will bring forward a couple of examples here.

In Roanoke, VA, in 1991 we discovered a trichlorethylene contamination in soil during one of our routine qualitative environmental survey programs, which is what we call our auditing program. We reported that to the appropriate agencies and let them know we were going to move forward to further characterizing the problem.

In 1992, it was discovered that there was a broader regional problem, still not attributed to ITT but it was there. We reported and we participated because of concerns that our operations may have contributed. We paid $192,000 to the local authorities to connect all of the local residents to appropriate water sources, to make sure they would not have a problem with the water.

In addition to having to do that and further characterize and evaluate our properties, we also had a $92,500 fine levied on us by the State Water Control Board which we decided not to contest because the legal cost would have probably exceeded any attempts we made in that area.

Another example we have is in Fort Wayne, IN, in the late 1980's during an underground storage tank removal. We again dis-

covered trichlorethylene contamination in soil, reported it to an agency. During the course of discussing with the Agency what we should be doing and how we should approach it, we asked for advice and instead we got an inspection and got fines—combined fines by the Indiana Department of Environmental Management and the EPA that approach $100,000.

It makes it very difficult to work with the agencies where you have those sorts of instances of penalties for trying to bring forward the issues that we should be reporting and we have a policy of overreporting within ITT and that is a very difficult policy for me to maintain at times when it seems like we are being taken to task for having done that.

ITT's program lab is a strong program and we intend to carry it forward. We are encouraged by the Agency's policies regarding environmental self-assessment and disclosure. They are moving in the right direction. Unfortunately, they are only policies and policies can be changed. EPA's policies have been changed many times in the past and it makes us a bit concerned that that sort of policy can only be depended on for the short term.

We think these policies need to be codified without having the codification of these sorts of incentives that are provided by this bill, there is a disincentive to a proactive program. It encourages a "don't ask, don't tell" philosophy, if you will, where it is better not to find things and then you don't have to report them than to be looking and finding and correcting.

Fourteen States have laws; 25 are pending. It is obvious that those States believe that the need for this legislation is clear. We agree. And once again, I am encouraged by the subcommittee's decision to convene the hearing today and I stand ready to assist you in your further deliberations.

Mr. GEKAS. Yes, we thank you, Mr. Leibowitz.

[The prepared statement of Mr. Leibowitz follows:]

PREPARED STATEMENT OF ALAN J. LEIBOWITZ, DIRECTOR, ENVIRONMENTAL HEALTH AND SAFETY, ITT DEFENSE & ELECTRONICS CORP.

Thank you, Mr. Chairman, for allowing me to come before the Subcommittee today to testify about the need for H.R. 1047, the Voluntary Environmental Self-Evaluation Act. This is very important legislation because of its potential to improve regulatory compliance and environmental conditions. I commend the Subcommittee for holding this hearing.

I am Director, Environmental Health and Safety at ITT Defense & Electronics, whose headquarters are in McLean, Virginia. I have been in charge of ITT Defense & Electronics' environmental compliance program for seven years. I am also Chair of the Electronics Industry Association's Environmental Issues Council and recently edited a book on auditing for the American Industrial Hygiene Association. ITT Defense & Electronics is a $1.5 billion company, operating fifteen major facilities throughout the United States. As is reflected by our interest in appearing before you today we believe that a comprehensive environmental audit program is an essential part of a responsible environmental management effort. This is true in the absence of any regulatory requirement to conduct such audits, particularly regarding the impact to the environment from historic operations.

It is my experience that environmental audits can best be conducted in an atmosphere of candor with as broad a distribution of information on required corrective actions as is possible. This ensures the involvement of those who must affect the needed changes. Where an organization fears regulatory repercussions from the results of their audits they may limit distribution, or employ confidentiality and language ambiguities that impede the proper management of these issues. These issues were a major consideration at the inception of ITT's environmental audit program in 1987. I offer the following as an example of the types of deliberations and cog-

nitive dissonance created by the current regulatory environment for progressive companies attempting to "do the right thing" environmentally.

In 1987 I approached my General Manager with a proposal to conduct environmental assessments of all of our facilities in order to develop a clear understanding of any concerns which may have arisen during our often long term occupancy of our manufacturing sites. While he had long been a strong supporter of environmental issues he had a moment's hesitation before telling me that "By approving this proposal I am violating a basic business tenet. I am asking questions for which I do not already know the answer." This statement and many subsequent conversations reflected the concern that we were facing a risk which could not be quantified in advance. Questions such as "What happens if and when an audit turns up as difficult environmental problem?" and "Are we ready to take 'the next step' and fix the problems that we find?" had to be answered before we could proceed. The risk was made all the more unpalatable by the knowledge that we faced potential regulatory action including fines in addition to having to address any harm to the environment.

It appears from my bench marking efforts with various industries that these same concerns have been faced by most corporations with varying outcomes, including decisions not to conduct audits for fear of uncovering liabilities. In such an environment a corporation's safest posture may be one of "don't ask don't tell" since there is no obligation to report if no investigation is conducted.

Despite these misgivings ITT's program moved forward, and within ITT Defense and Electronics we have spent over $2,000,000 conducting investigations of our facilities. This investigation cost approaches $10,000,000 for ITT as a whole and remedial costs for identified concerns have exceeded $100,000,000. These cost have been generated as a result of voluntary efforts.

I am pleased to report ITT has a world class auditing program which has served as an example for many other organizations. As a measure of how strongly we feel about environmental compliance, ITT incorporates the individual environmental audits from each of our plants into the plant manager's annual performance review. The results of a plant's environmental audit is one factor that is used to determine the plant manager's compensation and bonus for the year.

Despite this success, my ongoing efforts are often met by strong management concerns regarding the regulatory exposure such an aggressive program presents. If such questions continue to arise for a corporation the size of ITT one need not think very hard to envision the likely outcome of such considerations on a smaller business. There, the thought of tens of thousands of dollars in potential fines could easily have a chilling effect on their desire to take aggressive environmental action.

ITT's environmental compliance track record is quite good. I do not come before the Subcommittee with tales of environmental disasters or thorny battles with regulatory agencies over enforcement actions. Our usual environmental problems are "historical errors," which I would describe as things that were done legally and in accordance with accepted practice at the time that we now know, in hindsight, had an adverse impact on the environment.

If a limited privilege were afforded to environmental audits, and immunity from prosecution or penalties attached to any problems that were uncovered and corrected, I have no doubt that many other organizations would follow our lead. In so doing they would investigate areas in their operations beyond legal requirements. For ITT compliance with regulations is only a baseline goal that we try to reach beyond to achieve true environmental enhancement.

ITT has been willing to spend money to solve its environmental problems, and where the Agency provides incentives, reasonable companies will be especially encouraged to investigate their operations and to make changes that have actual environmental benefit. Over the years, ITT has taken advantage of several programs that provide amnesty from or limitations on fines or prosecution for environmental infractions.

We participated in the CAP program that EPA ran under section 8(e) of the Toxic Substance Control Act (TSCA). That program allowed us to report the Agency, possible violations with a limitation of the threat of fines. The program allowed us to take a hard look at all of our compliance issues under this section of TSCA, and, most significantly, to fix whatever problems we found. While ITT still would have had to report certain information to EPA in the absence of the amnesty program, it was the quantifiable limit on penalties that encouraged us to make a comprehensive investigation. Where such programs are offered they encourage reevaluation of compliance posture and correction of deficiencies.

ITT also took advantage of an amnesty program that was run by the state of Indiana concerning violations of the Clean Air Act. Although the newly enacted Indiana environmental audit privilege would arguably enable a company to avoid disclosure of its results, ITT did take advantage of a companion provision by bringing several

stationary sources under permit following a review of its manufacturing processes and air emissions. Under that provision, ITT's civil liability is limited to $2 to $3k per violation, and ITT entered into appropriate consent orders to implement its performance under that program. While this law does not immunize criminal conduct, deliberate failure to permit, or major sources of regulated pollutants it does facilitate a responsible party to undertake a review of its operations and emissions without undue concern for imposition of fines and penalties as thanks for its efforts.

Critics of this legislation raise the question of whether this legislation would provide immunity from prosecution to environmental "bad actors," and we believe the answer is "no." Since I know that others will explain this answer further, let me explain how the immunity provisions of the bill would help a company like ITT.

In 1991 at our Roanoke, Virginia plant we discovered some groundwater contamination during our company wide environmental audit program. We advised the State Water Control Board of our findings and our intention to investigate further. In 1992 continuing investigation revealed a local groundwater contamination problem that could not immediately be ascribed to ITT's operations. Despite this lack of clear responsibility ITT decided to ensure that all local drinking water supplies were secure and paid over $195,000 to connect local residents to the public water supply. Despite a lack of clear attribution of the harm to ITT and the fact that any source likely predated regulatory requirements ITT was fined $92,500 by the State water control board. We reluctantly decided to pay this amount to avoid litigation costs. Since this time we have continued our investigations and are in the process of working with the EPA to determine what actions will be required to address historic sources of contamination identified.

In another case during the course of routine underground tank and soil removal at one of our major plants in Ft. Wayne, Indiana, initial indications of possible soil contamination were discovered and reported to the State. Unfortunately in the course of remediating these historic releases to the environment both the State Agency, IDEM, as well as the EPA, levied penalties on ITT for an approximate total of $100,000. While the amount of the particular penalty may not be considered burdensome for a large company like ITT, the disincentive for identifying and reporting such inadvertent violations, even in the context of a voluntary remediation, is clear.

Because such incidents act as a disincentive to our proactive program we are very encouraged by the recently enacted state self-evaluation protection acts and the EPA's interim enforcement policy regarding self-assessment and disclosure. This policy is a significant improvement over the Agency's prior approach, since it mitigates penalties for some disclosures. It does not, however, codify elimination all of the obstacles that now exist to thorough environmental audit and disclosure.

Fourteen states have passed laws concerning environmental audits, and bills are pending in twenty-five additional states. It is obvious that those states believe that the need for this legislation is clear, and we agree. Once again, I am encouraged by the Subcommittee's decision to convene this hearing today, and I stand ready to assist you in your work as you move to consider H.R. 1047. Thank you, Mr. Chairman for the opportunity to testify.

Mr. GEKAS. I want to seize upon one of the last statements that you made to the effect that what the EPA has put into effect, the voluntary program which has been described in various degrees by everybody who has testified so far. They may feel that that is enough, but you assert that we still have to have the privileges and immunities that are built into this issue; is that correct?

Mr. LEIBOWITZ. Yes, I can use an example there. EPA has long had a policy of not asking for environmental reports. Several years ago at ITT, one of other facilities in Washington State, I believe it is—and I could get facts if we need it—there was a request during an audit and we had to go back.

A local inspector asked for the audits, our audit findings which were basically a roadmap to anything—it saves them time of having to look at a facility, in effect look at the work you have done. We went to the headquarters here in Washington and EPA said, no, we don't want to request that audit. But on a local level, policies are being made. Policies are being changed and we are very concerned that these sorts of things will be discovered and asked for in a given circumstance.

Mr. GEKAS. All four of you, in different degrees, also mentioned that you see the remedy for all of these troubles as including the necessity to have incentives, some of you used, and others used inducement. Are we talking about the proper incentives and inducements being the granting of privilege, and of immunity, as the incentive for voluntary reporting and compliance? What did you mean, Mr. Mattia, when you mentioned incentives, do you need the incentives or the inducement?

Mr. MATTIA. I think I used the term to eliminate the impediments to producing and working an environmental management system that contains audits.

What I mean by incentives, to answer your question, Mr. Chairman, is that an incentive to me is elimination of fear of use of my audit report.

Mr. GEKAS. Immunity?

Mr. MATTIA. To self-incriminate me. An incentive to go forward and find and fix and report, and not have to incur the additional indignity of paying additional fines and penalties for something that may never have been found if we had not taken the action that was in the best interest of the environment.

For smaller companies that cannot establish or afford to get involved in the more complex programs, such as those now in place for companies that you see at this table, I think additional types of incentives would probably be appropriate. Those types of incentives may go to training and assistance in establishing these types of programs, to even greater forgiveness in the areas where they find and work with things; i.e., maybe longer time frames to fix and remedy those problems because of their financial inability to move forward.

Mr. GEKAS. Mr. Stanga or Mr. Adler.

Mr. STANGA. Yes, Mr. Chairman, I want to follow up on your question as well.

Mr. GEKAS. Yes.

Mr. STANGA. I view the two principal elements of H.R. 1047, the creation of a qualified privilege for environmental audit reports in the testimony of the auditors, and a presumption against any civil or criminal fines for self-reported promptly corrected violations. I view those more as efforts to remove obstacles or disincentives, really, than the creation of incentives to audit.

Now there are these two big roadblocks that impede companies both who are thinking about starting audit programs and have not yet done so, or that affect the way the companies like those who are here testifying this morning run their programs and make them less effective because of current enforcement policies. These two roadblocks exist; these two obstacles exist.

So I look at this bill as one that would ameliorate those problems and make it an atmosphere where companies can audit without fear.

Mr. GEKAS. Yes. You mentioned the anecdote about the boiler that was placed 300 yards from where it was supposed to be. Why didn't the company just move it to where it was supposed to be in the first place or was there a regulation that that would have been violated if they had just moved it on its own? It seems——

Mr. STANGA. I will speak for Intel Corp., and if the committee requires more information about this then that, Intel can provide it. They will be pleased to provide it.

What I believe is the circumstance there is that under the New Mexico air pollution control regulations, there certainly is an obligation for any person who intends to install a major source of air contaminants and probably, in this case, it wasn't even technically major sources, but any source, even a medium-size boiler to first obtain a permit to install the source.

The permit would specify the location where the source is supposed to go. And the problem is that Intel has a very large manufacturing complex in Rio Rancho, NM. And at some point, the plans changed or at some point the installation of the boiler became a little confused. It was one of eight boilers that were added, and four more later were added. They installed 12 boilers at that time and one got installed in the wrong place.

The violation is one that had no environmental impacts whatsoever. They were 300 yards on the other side of the facility and instead of moving it, they thought it would be better to get the permits changed because there was no environmental or regulatory impediment to issue that permit for the other part of the property, but the agency fined them for it.

Mr. GEKAS. I think I would put that before our new corrections calendar system for immediate remedy on the floor of the House.

Mr. Herman privately told me, and others, that he, as an official of the EPA, feels that they are moving very strongly toward what you are accomplishing from the other end, and that you are negotiating, consulting, and talking about the entire matter. I would like to know if in the formation of your policies, of your consortia, was there consultation with EPA at the outset and notification, shall we say, by you to them of what you intended to do and how you were going to conduct audits, et cetera, in conjunction with their voluntary compliance program?

Mr. Adler.

Mr. ADLER. Mr. Chairman, we have been speaking with EPA and the States for a number of years about the sorts of programs that GE and other members of CMPG have in place to identify and correct violations. It is only in the last 6 months that EPA has issued this interim policy, actually it was in April, to address this issue.

They are aware of what we have done. The problem is that for the regulatory agencies, the Department of Justice, and State agencies, one of the things that they are judged on is enforcement. The number of cases that are brought and how many fines are collected. As long as they are judged—their performance is judged—on that, they are going to look to make cases, and cases are made most easily when a company has done the work, identified the facts, and disclosed them.

Those are what we referred to when I was at the Agency as "easy beans." And there is a built-in incentive for EPA and for State agencies to take those cases, even though the worst actors, the companies that did not do the environmental audits and the corrective action that they ought to have, are out there to find.

Mr. GEKAS. Did you want to add something, Mr. Mattia.

Mr. MATTIA. Yes, I do, Mr. Chairman.

I wanted to share with you that CEEC has been working with the Agency for over 2 years and, in fact, have had Mr. Herman and his staff in many of our meetings going back more than 2 years ago discussing these types of issues and moving in this direction.

I have been at this environmental auditing business since 1974, conducting audits and working these types of programs, and every time that I sit with an agency to present this type of an approach, they say, yes, it is a great idea, yes, we like it, yes, we see the need to take this kind of approach.

The flip side, as was just presented, is that the measurement system, as I shared with you in my earlier testimony this morning, the guide, the gauge on which they are judged does not permit such an approach. And, hence, the reluctance in the policies that have been recently distributed by the Agency. There is great reluctance by the Agency to let go of its present measurement system.

Mr. GEKAS. The time of the Chair has lapsed.

We now turn to our ranking minority member, Mr. Reed.

Mr. REED. Thank you, Mr. Chairman.

I want to thank the panel for very thoughtful and helpful testimony. I am also encouraged by the ongoing dialog between the industry, representatives, and EPA, and also, I think, environmental groups, I would point out.

As I said, I think today's hearing would have been also helped by some representatives of the environmental groups as well as the industry representatives, and I hope, either through written comments or perhaps even a hearing, we could get some of the viewpoints or perspectives of some environmental groups as well.

Mr. Adler, you represent today not only your own company but the compliance management policy group. And I understand and I would like my understanding verified, if possible, that the CMPG does not support penalty mitigation where there has been a significant economic benefit to the company involved or certain kinds of criminal conduct or serious harm to the environment. Is that correct?

Mr. ADLER. There may be certain circumstances and certain exceptions that are appropriate in how legislation would be crafted to address that sort of a problem. If there has been significant economic benefit to a company by virtue of the noncompliance, it may be appropriate to recover that significant economic benefit.

But there are very few instances where that really comes up. Companies do not do these things because there are significant economic benefits. So we see it as less of an issue.

Mr. REED. But as I understand the legislation, and you have probably reviewed it also, is that this specific legislation does not provide for such penalty mitigation.

Mr. ADLER. That is correct.

Mr. REED. That would be something closer to the EPA policy statement than the existing legislation.

Mr. ADLER. Yes.

Mr. REED. Let me also ask another question. We have here in this room, we have before us some of the major companies in this country, with elaborate staffs and expert staffs, obviously, as exemplified by your testimony, but if this legislation would pass, it would cover the gamut from the small jewelry manufacturing shop

in Providence, RI, all the way up to the sophisticated Intel microchip processing, if that is the right term, company.

It strikes me, and again this is not so much the law but the reality, that a lot of this auditing is a function of the size of the corporation and the expertise of the corporation. So that by changing the incentives, et cetera, we might discover that your companies would be more forthcoming, but the ones on the scale of the smaller companies, I wonder if we would in fact be encouraging more environmental auditing. And I just wondered—Mr. Mattia.

Mr. MATTIA. Yes. As I said, I have been at this since 1974. One of my first positions was to manage the environment, health, and safety for a very small company, approximately a $30 million company.

Mr. REED. Where I come from, that is not a small company.

Mr. MATTIA. Well, many large companies are made up of many small businesses, entrepreneurial businesses under a million dollars, and $34 million is a conglomeration of those.

In introducing these types of programs, I think you find, with the smaller companies especially, that the legal perspective of the counsel that are used for those corporations tends to prohibit the use of environmental auditing and environmental reviews, specifically because of the fears of punishment and "don't look, don't find, don't worry about it, and don't tell" issues, "what I don't know about, won't hurt me" type of approach. And that is what I have seen in smaller companies.

So I would think, in my view, that if you had this type of legislation, you would then relieve that tension between the counsel to smaller companies and doing the right thing.

Mr. REED. There is, I think—and throughout all your testimony you have all referred to the fact that it seems terribly unfair and also probably counterproductive to report to an Agency voluntarily and be a good citizen and then be fined. I think that resonates certainly.

This legislation goes beyond simply mitigating fines and eliminating penalties. It gives immunity from civil and criminal suits and basically provides privileges in terms of what can be disclosed. It seems to me that the major problem you face or you allude to is just the idea of being fined by reporting and this legislation goes way beyond that.

Let me start with a hypothetical; it might be helpful. As I understand the legislation—again, I am trying to grasp all of its meanings—there could be deliberate criminal activity at a company, known violations done for any number of reasons. It could be discovered by environmental audit. That environmental audit, if they took steps to correct it, would basically immunize the person responsible and provide privileges in terms of disclosure of information.

Is that a fair reading of what could take place under this legislation?

Mr. STANGA. If I may respond to that, Mr. Chairman and Mr. Reed, the bill as written would allow certain criminal activity to be entitled to a presumption against criminal fines being imposed for an organization. That is true. That is a possibility under this legis-

lation. And what I would suggest is that it is important to put that possibility into perspective.

The idea here is to encourage more companies to conduct environmental audits than currently are right now. To go back to your previous question for a second, you asked about small businesses and how this legislation would affect them. Right now, we are talking about only USEPA, Federal proceedings, Federal implementation of Federal enforcement programs. And that accounts, in my company's experience, for about 15 percent of the inspections we get at our facilities.

Most of the inspections would not be touched by this legislation. The circumstances small companies find themselves in is the EPA inspectors are quite unlikely to go to their facilities because of the limited number of inspectors and the limited amount of enforcement resources, it is a credible alternative to them not to know their full compliance status and, ironically, those are probably the ones that, because of less sophisticated resources at their disposal, have the greatest violations liabilities.

So yes, there is a possibility that some criminal conduct may receive this presumption against fines, but the overall benefit of the legislation ought to be that there will be more auditing which in the overall scheme of things result in overall improvement in compliance.

When you think about legislative approaches like that, what is more important, the opportunity to impose a fine in every case for every violation as the way to achieve higher compliance levels or just achieving higher compliance levels through other means? This pursues that through another means and the penalty for that or the downside or tradeoff is there will be the possibility of some criminal conduct may not be covered.

Mr. REED. Let me take it a step further. Again, looking at the legislation and I think we have all looked at it, this would also immunize companies and individuals from private civil actions. Let's take a hypothetical again. Again, I just want to see if this is a correct understanding, your understanding.

Let's say a company was deliberately and knowingly, for many reasons, discharging a known carcinogen in the air, discovered that the surrounding community had extraordinary rates of cancer and you could make a credible case. And I think many of us here are lawyers. It is easy at least to make the case, not get a judgment, that in fact the injuries were caused by the company.

Now, as I understand this legislation, that if before a suit was initiated there was a voluntary compliance report to the EPA and corrective action was taken, that there would be immunity from a civil suit to collect damages? Again, I am trying to find out what your understanding is.

Mr. STANGA. May I respond to that again, Mr. Chairman?

Mr. Reed.

Mr. REED. Sure.

Mr. STANGA. The circumstance that you are describing is one which raises the question about the presumption against fines or penalties and how far that extends and it is important to keep in mind the limitations in H.R. 1047 of the extent of that benefit. It is not an absolute immunity.

We are talking about a presumption against fines here that can be rebutted and if we take your scenario and we talk about exposure of neighbors to hazardous chemicals based on either negligent or intentional action at a facility, this legislation I don't believe is intended and I don't believe if fairly interpreted would prohibit those people from bringing a toxic tort case against the source of those materials, the source of the fear of being sick or the actual becoming sick, and also this legislation would not—although it would affect the ability to impose fines, it would not cut off the rights of neighbors to redress remedies or redress violations of that sort or torts of that sort.

There needs to be a distinction created here or understood that the legislation creates between fines and penalties under the environmental statutes and damages. This doesn't have any impact on preventing the assessment of damages against a person who has caused a tort or a harm.

Mr. REED. Is that the understanding you all share?

Mr. ADLER. Yes, Mr. Reed. If I can amplify on that——

Mr. REED. Please.

Mr. ADLER [continuing]. A little bit.

The protection, the immunity that exists would be for the document itself and how it was gathered, not for the underlying facts. The underlying facts are still available. That can't be changed or hidden in any way so that that would be available, as Mr. Stanga suggested, for citizens, for anybody else through any other means of identifying it and using it, so this does not impact those sorts of cases. The disclosure immunity from penalties is a different issue and that just fits into the enforcement context.

Mr. REED. Let me, if I may, just for clarification.

Mr. GEKAS. Without objection, and I don't object.

Mr. REED. Thank you, Mr. Chairman. So your position again would be that the privilege that could extend to civil actions as well as criminal actions or enforcement actions in terms of protecting the specific documents.

Mr. ADLER. Yes.

Mr. REED. But the immunity from action, if you will, is strictly limited to enforcement actions by State or Federal authorities and not civil damage suits?

Mr. ADLER. That is my reading of the legislation.

Mr. REED. Thank you, Mr. Chairman.

Mr. GEKAS. Yes. I thank the gentleman.

We have in past occasions declared that this type of testimony with citizens coming forward is very valuable to us. And you should take it to be a tenet of the way we operate that your testimony will be taken into consideration before the final product emerges from this subcommittee.

We can outline to you a half a dozen times this year where the testimony of witnesses like yourselves have entered into the final product. So we thank you and we will proceed to the next panel.

Can you hold it? Mr. Reed has another question.

Mr. REED. With the chairman's indulgence.

Mr. GEKAS. He will not have lunch.

Mr. REED. That is right. I am being punished. No lunch, but I am immune from further punishment.

A quick question. Frankly, you are the experts. What intrigues me is, should there be some basic standard to qualify an appropriate environmental audit scheme in a company? I alluded to this issue earlier, talking to Mr. Hefley. An audit can run the gamut from running around every month and kicking the tires and looking out and seeing if there is any obvious oil on the ground, et cetera, to the elaborate analyses that you do.

And as industry representatives, in fact professionals who if this passes will feel, I think, a professional sense of purpose to go out there and make sure this is done at the highest level, do you think that through legislation or some type of rulemaking there should be at least some threshold standards to qualify you for these immunities given the type of program you run?

Mr. MATTIA. Let me try to get into that. Mr. Reed, and Mr. Chairman, environmental audits take on various forms and the definitions are so confused, I think what we are talking about and what I would be looking at would be a systematic process of review and it goes in all facilities every day in the safety areas in the environmental areas where there is a checklist. There are walk-throughs. There are not the heavy formalistic five lawyers, seven auditors coming in and pulling a facility apart.

And in order for this process to work and in order for the information to bubble up and come forward, I think you have to let that process work at the lowest levels in an organization. I mean, it is easy for a corporate office to send in review teams and divisions of major corporations to send in review teams, but the real work is done by the day-to-day people on the floor, the worker who has got to do the job. He knows when things are right. He knows when things are wrong.

And in order to establish a system where they can bring that information forward so that action can be taken, I think you have to let the definitional issue of environmental review or environmental audit be a systematic program element and not a specific definitional ISO 14,000 audit scheme.

Mr. REED. Financial audits are governed by generally accepted accounting principles. I wonder, if we are going to go down this road, whether we need something comparable maybe not dictated by the Government, but a standard of reference so that we don't have arguments in court about immunities and privileges based upon somebody making a stroll through their property and said I called up and left a message at EPA that there was a problem. And, again, I think my time is up. I want to make that point if you would like to respond in writing.

Mr. STANGA. If I can answer quite quickly, Mr. Chairman and Mr. Reed, there is actually a blueprint which constitutes an effective auditing program and that is the appendix to EPA's July 1996 policy on environmental auditing. I am sure the Agency can elaborate on it.

Frankly, there are seven elements that the Agency says ought to be present in an effective environmental auditing program and I think they are very good suggestions. We modeled our program after them and the importance of having the flexibility to tailor an auditing program to the size and corporate culture of a company, a company as big as GE on the one hand or as small as a jewelry

manufacturer in Rhode Island on the other, is really important and that is what we have to be careful we don't trample by sticking standards in.

On the other hand, there are these generally accepted principles that now exist and you can lay the tire kicking exercise up alongside of them and figure out whether it complies or not. So I think there are already things there.

Mr. REED. Thank you, Mr. Chairman.

Mr. GEKAS. We dismiss the panel with our thanks before Mr. Reed can ask another question.

Mr. REED. Forgive me.

Mr. GEKAS. Our next panel who will be representing the administrative portion of the testimony will be Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance of the EPA; Lois Schiffer, Assistant Attorney General, Environmental and Natural Resources Division, Department of Justice, accompanied by Randall Rathbun, U.S. attorney for the District of Kansas; Harry Kelso, director, policy and research, Virginia Department of Environmental Quality; David W. Ronald, criminal unit chief, Environmental Enforcement Section, Office of Attorney General of Arizona; and Cynthia L. Goldman, Esq., of-counsel with the firm of Gibson, Dunn & Crutcher of Denver, CO.

We will ask this panel to adhere to the 5-minute rule, and we will begin in the order that they were announced with Mr. Herman making the first presentation.

STATEMENT OF STEVEN A. HERMAN, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL PROTECTION AGENCY

Mr. HERMAN. Thank you very much, Mr. Chairman and Congressman Reed. I am very pleased to be here to give the Environmental Protection Agency's view on H.R. 1047 and also EPA's policies and efforts regarding enforcement and compliance. Most people accept the premise that voluntary environmental audits and evaluations should be encouraged to increase compliance in environmental protection. The tougher question is, how do we encourage responsible behavior without undermining the protections offered by our environmental laws and expected by the American people.

Before discussing the specifications of our policy and our concerns and observations about H.R. 1047, I would like to review some general enforcement and compliance principles which have been decided by us and I believe have wide support. My written testimony discusses these matters in more detail and I would ask that they be made part of the record.

Mr. GEKAS. Without objection, so ordered.

Mr. HERMAN. Thank you, Mr. Chairman.

First, we believe strong enforcement can and must go hand in hand with other compliance tools that do not necessarily rely on penalties. For those who would comply if only they had better information or technical assistance, we want to provide it and we have taken steps to do that. For the environmental criminal at the other end of the spectrum, we want swift justice.

We must be able to act quickly to address environmental emergencies and we must continue to keep companies that do not com-

ply with our laws even if inadvertently from gaining a competitive advantage over those who invested in compliance. That is not a question of punishment. It is a question of fairness, pure and simple. We should encourage openness and we should discourage secrecy. We should encourage small businesses to seek help for problems they have difficulty understanding and all members of the regulated community to disclose and quickly fix their violations. And where adequate incentives do not exist, we should create them, but incentives that rely on secrecy will only breed distrust.

Full and frank disclosure is a vital part of moving away from the command and control regulation which we have been trying to do and is necessary if we are to restore the public's faith not only in its Government and its laws but also in the regulated community.

The Agency's new self-disclosure policy which has resulted from a 10-month reassessment of our policies relating to environmental audits offers facilities that voluntarily disclose and fix violations identified through self-policing greatly reduced penalties and safe harbor from criminal referrals. Specifically, if you find, disclose and correct violations we will eliminate the gravity or the punitive component of the penalty. You will only have to pay any significant economic benefit that you might have gained relative to others who complied on time.

This is equity, not punishment. In many cases, where no economic benefit can be established or where it is minimal, we will collect no penalty at all. The only exceptions in this policy—we think make good sense—involve criminal conduct, they involve instances of serious environmental harm; they involve environmental emergencies; and they involve patterns of repeat violations needed to be—which we need to deal with speedily and forcefully.

The American people expect a firm response to those situations and our policy retains the tools to do so. We do not think that behavior which results in those types of situations should be immunized nor should the information be privileged.

Our policy we believe, Mr. Chairman, carefully balances all of the stakeholder interests—the regulated community, the public, and the Government. The regulated community gets incentives to comply and predictability The public gets compliance and is not kept in the dark. The results for all of us is compliance and the assurance that the Government can take action when it is needed.

We are currently taking public comment on the policy and we will continue to examine it to see if improvements need to be made. We do not believe that H.R. 1047 is a balanced approach for promoting voluntary compliance. And I would like to very quickly outline my main concerns for you.

It creates an unprecedented new privilege that would allow environmental problems to be kept secret not only from the Government but from the communities, from our people. The evidentiary privilege in this bill would go far beyond the attorney-client and work product privileges because it would broadly shield facts that might be crucial in holding polluters accountable for their actions and disputes regarding privileged claims will be decided out of the public view in secret, in camera hearings. These procedures will invite extensive and expensive litigation. Mark my words, with this law, some criminals will be able to game the system and walk

away unpunished even where reckless disregard to environmental problems leads to a major disaster.

But this new privilege found in H.R. 1047 is not needed to achieve the goals we are seeking, we are all seeking. A recent industry sponsored survey of 369 businesses, and this is the same survey which the witnesses prior—on the prior panel referenced, the recent survey of 369 businesses found that 83 percent either audit already or plan to do so in the near future. And they do it for lots of reasons.

For example, to avoid liability, find cost-saving opportunities or satisfy consumer or lender expectations. Incentives, therefore, already exist. And they are further promoted by our new policy regarding penalty mission which I earlier described.

One thing is clear, though, for those companies that do not self-audit, a lack of confidentiality was not a major factor. Privilege, in other words, is a solution in search of a problem. The penalty immunity provision in the bill gives violators an unfair economic advantage over their law-abiding competitors by glossing over significant economic benefits that they may have received while not in compliance of the law.

At least 10 States have decided that this type of legislation is a bad idea. Groups like the National District Attorneys Association and many law enforcement officials and agencies also oppose it.

I urge you to follow their lead and give EPA's tools a chance to work.

Applied nationally our self-disclosure policy provides the regulated community with the right incentives to comply with the law and preserve a healthy environment without the many pitfalls that I have discussed this morning.

Mr. Chairman, I would like to thank you for the opportunity to be here today. I would like to request that our publicly accessible environmental auditing docket, which has been compiled during our 10-month process, be placed in the record by reference so that the subcommittee can have the benefit of the wealth of information that we have gathered from all the interested parties.

I would be happy to answer any questions.

Mr. GEKAS. Without objection, the information shall be made a part of the record by reference thereto.

Mr. HERMAN. Thank you, Mr. Chairman.

[The prepared statement of Mr. Herman follows:]

PREPARED STATEMENT OF STEVEN A. HERMAN, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL PROTECTION AGENCY

Good morning, Chairman Gekas and members of the Subcommittee. Thank you for the opportunity to provide the Environmental Protection Agency's views on issues relating to incentives for voluntary self-policing, self-disclosure, and self-correction. This is one of the most important areas that my office, the Office of Enforcement and Compliance Assurance, has been working on in the past year, and we have achieved concrete results. Our goal is the same as the goal of H.R. 1047: to strongly encourage the regulated community to voluntarily self-monitor and quickly correct environmental problems. We have made significant changes in our policies that we are confident will encourage self-monitoring, self-disclosure, and self-correction, and will promote environmental compliance in the regulated community and a healthier environment for all of us.

We have sought to adopt approaches to promote responsible compliance behavior without limiting the public's right to know, or constraining our ability to enforce the

law in appropriate cases. We feel strongly that in the area of environmental protection, approaches based on secrecy, rather than openness, will be devastating to our efforts to rebuild trust among industry, the regulators and the public.

In our policies, we have aimed to provide certainty and predictability in a way that will encourage those in the regulated community who are committed to compliance to come forward and make their commitment public—which in turn will allow us to focus our enforcement resources on those who do not come forward, but instead continue to evade their environmental responsibilities and place the public and the environment in danger.

NEW INTERIM POLICY ON SELF-POLICING AND SELF-DISCLOSURE

On March 30, 1995, I was proud to sign the Interim Policy on Self-Policing and Self-Disclosure as part of the Clinton Administration's reinvention of regulation. This new policy provides real incentives for industry to voluntarily find and correct environmental violations. It offers facilities that voluntarily disclose and fix violations identified through self-policing greatly reduced penalties and a safe harbor from criminal referrals.

This policy is a good example of the Clinton Administration's common-sense approach to environmental protection. It is balanced and carefully crafted to give the regulated community predictability and to reward environmentally responsible actions without unduly limiting effective enforcement of our environmental laws or the public's right to know. I am confident it will go a long way toward increasing compliance.

It bears mention that the question we asked when we began our policy reassessment was whether the regulated community needed additional incentives to encourage voluntary disclosure and correction of violations that are revealed in environmental audits. On one hand, we concluded that the new incentives in our policy will further promote responsible compliance-oriented behavior. On the other hand, our review of surveys on audit practices and our discussions with stakeholders convinced us that for many, many companies especially large corporations—any "chilling effect" that our enforcement policies supposedly had on self-auditing has been more than offset by existing incentives to have a comprehensive auditing program—for example, minimizing exposure to penalties; ensuring that environmental control systems are functioning; decreasing operating and financial risks; meeting customers' environmental expectations; satisfying investor criteria and improving access to capital; helping to secure insurance; meeting vendor certification criteria; demonstrating reasonable care; and identifying cost-savings opportunities.

I am proud of the process we followed in developing this policy. We sought the views and concerns of industry, state environmental commissions, state attorneys general offices, district attorneys' offices, environmental and public interest groups and professional environmental auditing firms, and we worked closely with the Department of Justice. We held two public meetings, invited representatives of different viewpoints to meet with an Agency-wide work group, and established a public docket to receive comments and publish internal documents related to the policy development process. My staff has traveled the country explaining our process and our policy and receiving constant feedback from a wide range of interested groups. The policy builds on concepts that received wide support among these groups.

Many States are considering or have passed laws that try to address the concerns we have tackled with this policy. After careful analysis, EPA has concluded that our policy offers a positive alternative to statutory audit privileges or blanket penalty immunities for self-disclosure that promote secrecy, and would expand litigation and compromise enforcement actions. We should not create secrecy in a system that should be accountable to the public, or let lawbreakers gain an economic advantage over their law-abiding competitors. Our policy accomplishes the goal of encouraging self-monitoring and self-correction without the disadvantages posed by the privilege and immunity proposals.

A summary of some of the major provisions of EPA's interim policy include:

A. SCOPE OF PENALTY MITIGATION

EPA will substantially reduce civil penalties for regulated entities that voluntarily disclose and promptly correct violations which are identified through self-policing.

EPA's penalties have two components: the "gravity" component, which reflects the seriousness of the violation and the nature and history of the violator, is geared towards punishment and deterrence; the "economic benefit," which the major environmental laws require EPA and the states to consider in assessing penalties, is a nonpunitive means for leveling the playing field.

The policy completely eliminates all of the gravity component of the penalty if the violation involves neither criminal conduct, "imminent and substantial endangerment" or serious actual harm to human health or the environment, and if the regulated entity meets seven conditions, i.e.: discovers the violation through a voluntary environmental audit or voluntary self-evaluation; discloses the violation promptly and voluntarily prior to government or third-party action; corrects the violation promptly; immediately remedies conditions that create or have created imminent and substantial endangerment to human health or the environment; implements measures to remedy environmental harm due to violation and prevent recurrence of violation; has not failed to take appropriate steps to avoid repeat or recurring violations; and cooperates with EPA and provides needed information, e.g. relevant documents and access to employees and others having knowledge of the violation.

In situations where most, but not all, of the conditions are met, the policy provides up to 75% mitigation of the gravity component of the penalty.

While the "gravity" (deterrent) component of the penalty would be fully or substantially mitigated in most cases, the Agency would still collect the benefit derived from noncompliance. Most members of the regulated community make good faith efforts to achieve maximum compliance with environmental laws. Collecting the economic benefit merely ensures that someone who broke the law does not gain a competitive advantage over others who invested in timely compliance. Many industry sources support EPA's practice of collecting economic benefit, even in cases of voluntary disclosure, because it levels the playing field.

B. LIMITING FEDERAL GOVERNMENT ACCESS TO AUDITS

In accord with current practice, the policy explicitly states that EPA will not use voluntary audit reports to trigger a civil or criminal investigation. The Agency will consider requesting reports only when it has other, independent information which indicates that a violation may have occurred and a civil or criminal investigation is already underway. By limiting audit requests to these circumstances, the policy ensures that EPA will not engage in 'fishing expeditions' where no basis exists to believe that a violation may exist.

C. FORGOING CRIMINAL SANCTIONS

Third, EPA will not recommend referral to the Department of Justice (DOJ) of criminal cases against regulated entities that voluntarily disclose and promptly correct violations identified through self-policing and meet all the specified conditions, unless there has been management activity to condone, conceal, or ignore the violation. We do not extend this promise not to recommend criminal charges to individuals who have engaged in criminal conduct. EPA's recommendation of no criminal charges, while not binding on DOJ, would carry substantial weight.

Our approach does have implications for states. Oklahoma and Arizona have adopted policies similar to ours, and we encourage other states to follow their lead. However, in States that have enacted audit privilege or penalty immunity statutes, where those statutes impede the states from addressing the most serious environmental violations and crimes—the ones that we all agree deserve some penalty, even if discovered and disclosed through voluntary efforts—the federal environmental laws require EPA to scrutinize enforcement more closely, and possibly to increase federal enforcement. We will take a close look to see whether these laws prevent a state from obtaining information needed to establish criminal liability or the nature and extent of a violation, assessing appropriate penalties for violations that result in serious harm, or assuring prompt correction and remediation of the adverse effects of such violations. We will work with the states to address these concerns and ensure that the expectations of the American people for strong environmental protection throughout the Nation are met.

We believe our policy goes far in addressing the major concerns raised during our extensive public process. At the same time, we are receiving comment on the interim policy until June 30 and have participated this month in an American Bar Association-sponsored dialogue with interested stakeholders. On one hand, industry still has some concerns with respect to our treatment of economic benefit, the scope of the definition of "voluntary disclosure," the limitation on coverage of the policy to criminal acts by individuals, and considerations regarding private litigants. On the other hand, our interim policy is very similar to a proposal we received last summer from the Compliance Management Policy Group, a coalition that includes the Chemical Manufacturers Association the American Petroleum Institute, the American Forest Products Association, AT&T, General Electric, Boeing, Exxon, Monsanto, Browning Ferris, the National Solid Waste Management Association and

Rohm and Haas. Over the next few months, we will continue to look for ways to refine or improve the policy.

CONCERNS WITH AUDIT PRIVILEGE AND PENALTY IMMUNITY LEGISLATION

Earlier this year, Representative Hefley introduced H.R. 1047 that, like our policy that I have described, attempts to create new incentives for companies to evaluate their compliance status and correct the problems they find. I commend Representative Hefley and other members for the attention they have given these important issues. Nonetheless, I do have serious concerns regarding H.R. 1047.

First, it appears that environmental damage or even disasters caused by recklessness, gross negligence or even knowing or intentional conduct could go unpunished under the proposed law. Specifically, H.R. 1047 would eliminate all punishment for certain criminal and other violations that are voluntarily disclosed regardless of the harm. Second, as we read H.R. 1047, a "voluntary disclosure" for which total immunity is granted includes information that is required to be reported, e.g., notification of emergencies and routine reports, such as Discharge Monitoring Reports under the Clean Water Act. This immunity covers not only administrative, civil and criminal penalties, but also cease and desist orders that may be crucial in emergencies. Truly voluntary disclosures should be encouraged, but it is not necessary to give total immunity and prevent cease and desist orders for criminal and other harmful acts to do so.

Second, H.R. 1047 establishes an unprecedented new privilege that would allow industries to keep secret from the public evidence of violation of an environmental law found through a "voluntary environmental self-evaluation" so long as the company has begun to correct the problem. This self-evaluation privilege would also restrict the government's ability to obtain evidence, even in criminal investigations. An *in camera* (or secret) court hearing would be the only vehicle to determine whether any of the narrow exceptions to the privilege applied.

Surely, if we are to move away from command and control regulation, the public must have confidence that the regulated community is operating safely and within the limits of the law. The privilege proposed in H.R. 1047 will thwart efforts to build public trust by throwing a web of secrecy around the critical process of identifying and correcting environmental violations.

Third, the bill encourages litigation that will further burden our already taxed judicial system. Given that there are no national standards for auditing, how will we determine what falls within the scope of an audit? The definition of "voluntary environmental self-evaluation" in H.R. 1047 could allow violators to argue that many routine business activities are "compliance evaluations" simply to evade disclosure. Proving such evasion could be nearly impossible. And how will a busy federal judge decide what it means to make "reasonable efforts" to correct a complex environmental violation? What kind of "compelling circumstances" will the government need to show to overcome the privilege in a criminal investigation? These and many other questions will provide plenty of work for lawyers as both sides try to test the limits of the privilege. And this litigation free-for-all will take place in secret courtroom sessions out of the public's eye.

Fourth, the bill appears to prevent prosecutors from obtaining environmental audit information even when that information may be the only available evidence of criminal intent. As such, this legislation could very well shield egregious criminal conduct from prosecution. Criminal investigations—which depend on speed—would be delayed as prosecutors were forced to prove they had a "compelling need" for evidence claimed as privileged by defendants. Unless prosecutors could demonstrate the need, they would be unable to obtain or use evidence of past criminal conduct in an audit, no matter how extreme, so long as the company made "reasonable" efforts to correct the violation. The National District Attorneys Association has said that, "[T]he adoption of a self-audit privilege risks affecting the activities of every law enforcement agency in this country. . . . To overcome a privilege, and successfully prosecute a criminal act of any type requires the state to undergo great hardship. . . ."

Fifth, the evidentiary privilege in this bill would go far beyond the attorney-client and work product privileges by potentially shielding from the government and the public virtually all factual information about environmental noncompliance—including facts underlying a self-evaluation that might be crucial in holding violators accountable for their actions.

Finally, the penalty immunity provision in the bill gives violators an economic advantage over their law-abiding competitors. It makes sense to give substantial penalty reductions for those who come forward with their violations and promptly correct them. But, as several industry sources have agreed, to maintain a level playing

field, the federal and state governments must be able to recoup the economic benefit of violations—even inadvertent ones that are discovered voluntarily.

We are not alone in recognizing these concerns. While audit privileges are favored by some in industry, they are opposed by law enforcement agencies (including the National District Attorneys Association) as well as virtually every public interest group.

As you move forward, I look forward to discussing with you these and other concerns that we have. In addition, I urge you to consider the many different viewpoints that we took into account in developing our policy and to continue a vigorous public dialogue. Our docket on environmental auditing contains a great deal of information that we have gathered during our reassessment which I hope you will find to be a useful resource in connection with these issues.

Again, I appreciate the opportunity to provide you with EPA's perspective on issues relating to voluntary environmental self-evaluation. I look forward to continuing to work with you on these issues.

I would be happy to answer any questions.

DOCKET C-94-01 ENVIRONMENTAL AUDITING POLICY COMPLIANCE

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc.	Date of Document
II-B-1	09/08/94	Agenda for EPA Public Meeting on Environmental Auditing	07/27/94 - 07/28/94
II-B-2	09/08/94	Ground Rules for EPA Public Meeting on Environmental Auditing	07/27/94 - 07/28/94
II-B-3	09/08/94	List of Attendees, EPA Public Meeting on Environmental Auditing	07/27/94 - 07/28/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-01	09/08/94	Letter from Tom Norton, President of Colorado Senate, Timothy Foster, Majority Leader, Colorado House of Representatives, and Al Meiklejohn, Senate Bill Sponsor, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Regarding Environmental Auditing Privilege and Voluntary Disclosure Provisions in Colorado Senate Bill 94-139	07/22/94
II-C-02	09/08/94	Letter from Beverly J. Gard, Indiana State Senator, to Brian P. Riedel, Office of Compliance, U.S. EPA, Regarding Environmental Auditing Privilege Provisions in Indiana Senate Enrolled Act No. 417	07/22/94
II-C-03	09/08/94	Letter from Patricia L. Miller, Indiana State Senator, to Brian P. Riedel, Office of Compliance, U.S. EPA, Regarding Environmental Auditing Privilege Provisions in Indiana Senate Enrolled Act No. 417	07/22/94
II-C-04	09/08/94	National District Attorney's Association, Environmental Protection Committee Resolution on Environmental Auditing.	07/23/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-05	09/08/94	Letter with Attachment from Fred Hanson, Director, Oregon Department of Environmental Quality, to Steve Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, Regarding Limited Environmental Audit Privilege in Oregon Senate Bill 912	07/25/94
II-C-06	09/08/94	Letter from Michael Feeley, Colorado State Senate Minority Leader, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Regarding Environmental Audit Privilege and Voluntary Disclosure Provisions in Colorado Senate Bill 94-139	07/25/94
II-C-07	09/08/94	Letter from Mark R. Kruzan, Indiana State Representative, to Steve A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, Regarding Environmental Audit Privilege Provisions in Indiana Senate Enrolled Act No. 417	07/25/94
II-C-08	09/08/94	Selected Comments of John Williams, Washington State Department of Ecology, Regarding Rational for a Civil Audit Policy and Civil Enforcement Penalty Policy for Self-Reported Violations	07/26/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-09	09/08/94	Statement of David W. Ronald, Arizona Assistant Attorney General, for EPA Public Meeting on Environmental Auditing with Attachments. Attachments Include: (1) Model Uniform Audit Privilege; (2) Oregon Environmental Audit Privilege (Senate Bill 912); (3) Kentucky Environmental Privilege Law (House Bill (681); (4) Indiana Environmental Audit Privilege Law (Senate Enrolled Act 417); (5) Colorado Environmental Privilege Law (Senate Bill 94-139); (6) John S. Gillig, Environmental Special Counsel, Office of Kentucky Attorney General, "Comparison of Statutes Establishing an Environmental Audit Privilege in Kentucky and Oregon;" (7) Compilation of Information on Consent Agreement Between Pennsylvania Department of Environmental Resources and WMX; (8) Compilation of Information on Settlement Agreement Between Colorado Department of Health and Coors Brewing Company; (9) Robert W. Darnell, "Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?," American Criminal Law Review, Vol. 31:123, Fall 1993; (10) Annette T. Crawley, "Environmental Auditing and the 'Good Samaritan' Doctrine:	07/27/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-10	09/08/94	Statement of Gale Norton, Colorado Attorney General, for EPA Public Meeting on Environmental Auditing Policy	07/27/94
II-C-11	09/08/94	Statement of Marlen Dooley, Assistant Commissioner for Enforcement, New Jersey Department of Environmental Protection, for EPA Public Meeting on Environmental Auditing	07/27/94
II-C-12	09/08/94	Statement of Gerald B. Davenport, Chair, Special Committee of the Environmental Law Section, Oklahoma Bar Association, for EPA Public Meeting on Environmental Auditing. Attached to Statement is Discussion Draft from the Special Committee of the Environmental Law Section of the OBA (10/28/93)	07/27/94
II-C-13	09/08/94	Letter from Roberta L. Soltz, Ph.D., Director of Environmental Compliance, Metropolitan Water District of Southern California, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Regarding Environmental Leadership Program and Environmental Auditing Policy	07/27/94
II-C-14	09/08/94	Comments of Group of Attorneys General of 14 States on Environmental Auditing Policy.	07/27/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-15	09/08/94	Statement of David A. Gallogly, Assistant Counsel, Office of Chief Counsel, Pennsylvania Department of Environmental Resources, for EPA Public Meeting on Environmental Auditing, Breakout Group A -Policy Options/Enforcement Issues	07/28/94
II-C-16	09/08/94	Statement of Michael O'Connor, Deputy Commissioner for Public Policy and Planning, Indiana Department of Environmental Management, for EPA Public Meeting on Environmental Auditing	07/28/94
II-C-17	06/08/95	Letter from Scott Harshbarger, Attorney General of Massachusettes, to Carol Browner, U.S. EPA, Regarding Environmental Audits and Audit Privileges	02/02/95
II-C-18	06/08/95	Moved to VIII-A-59	02/03/95
II-C-19	06/08/95	Letter from James Campbell, Executive Director, Virginia Association of Counties, to George Allen, Office of the Governor of Virginia, Regarding their Opposition to Virginia House Bill No. 1845	02/21/95
II-C-20	06/08/95	Letter from Hubert Humphrey III, Attorney General of Minnesota, to Carol Browner, EPA Administrator, and Janet Reno, U.S. Attorney General, Supporting Environmental Auditing and Opposing Privilege Legislation	02/22/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-21	06/08/95	Letter from Robert Deschamps, President, National District Attorneys Association, to Carol Browner, EPA Administrator, Regarding the Consideration by Oregon and Colorado of Providing Evidentiary Privileges for Environmental Self-Audits	02/23/95
II-C-22	06/08/95	Letter from Randall Rathbun, U.S. Attorney for the District of Kansas, to Lois Schiffer, Assistant Attorney General Regarding the Enactment of an Evidentiary Privilege	02/27/95
II-C-23	06/08/95	Letter from Kent Markus, Acting Assistant Attorney General, U.S. Department of Justice, to Newt Gingrich, Speaker, U.S. House of Representatives, Regarding H.R. 1047 "The Voluntary Environmental Self-Evaluation Act"	03/03/95
II-C-24	06/08/95	Moved to VIII-15	04/20/95
II-C-25	06/08/95	Letter from Daniel Lungren, Attorney General, State of California Department of Justice, to Carol Browner, EPA Administrator, Supporting the EPA's "Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement" as Published in the 4/3/95 Federal Register	05/04/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-26	06/08/95	Letter from Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Division, to Randall Rathbun, U.S. Attorney for the District of Kansas, Regarding the Environmental Crimes Subcommittee and the Creation of an Evidentiary Privilege or Immunity Law	05/15/95
II-C-27	06/08/95	Letter from Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Division, to Christine Milliken, Executive Director and General Counsel, National Association of Attorneys General, Regarding the Views of the Division Concerning Evidentiary Privileges for Environmental Audits	05/15/95
II-C-28	06/27/95	Letter from Robert Deschamps, President, National District Attorneys Association, to the Honorable George Gekas, Chairman, Subcommittee on Commercial and Administrative Law, Regarding Hearings on HR 1047	06/21/95
II-C-29	06/27/95	Moved to VIII-A-70	04/03/95
II-C-30	06/27/95	Moved to VIII-A-71	05/12/95
II-C-31	06/27/95	Moved to VIII-A-72	05/12/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-32	06/27/95	Letter from Steven Houran, Associate Attorney General for New Hampshire, to Joel Blumstein, Region One, Regarding Proposed Environmental Self Audit Privilege Bill. A Copy of the Bill is Attached (HB 275)	03/13/95
II-C-33	06/30/95	Comments on interim self policing and self disclosure policy from David Ronald, Assistant Attorney General for the State of Arizona	6/30/95
II-C-34	06/30/95	Comments on interim self policing and self disclosure policy from Paul Liemandt, Chief, Compliance & Enforcement Section, Minnesota Department of Agriculture	06/30/95
II-C-35	06/20/95	Comments on interim self policing and self disclosure policy from David Struhs, Commissioner, Commonwealth of Massachusettes, DEP, to Steven Herman, Assistant Administrator, OECA	06/01/95
II-C-36	06/30/95	Comments on interim self policing and self disclosure policy from Gregory Adams, Assistant Departmental Engineer, County Sanitation Districts of Los Angeles County	05/26/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-37	06/29/95	Comments on interim self policing and self disclosure policy from Colin Duffy, Surviellance Unit Supervisor, Bureau of Air Management, State of Wisconsin Department of Natural Resources	06/26/95
II-C-38	06/30/95	Comments on interim self policing and self disclosure policy from Gordon Wegwart, Assistant Commissioner, Minnesota Pollution Control Agency. CC Steven Herman, Assistant Administrator, OECA	05/03/95
II-C-39	06/08/95	Comments on interim self policing and self disclosure policy from Tamra-Shae Oatman, State Small Business Advocate, Texas Natural Resource Conservation Commission	05/25/95
II-C-40	06/30/95	Comments on interim self policing and self disclosure policy from Frank Bifera, Acting General Counsel, New York State DEC	06/12/95
II-C-41	06/05/95	Comments on interim self policing and self disclosure policy from Jane Nishida, Secretary, Maryland Department of the Environment	05/31/95
II-C-42	06/05/95	Comments on interim self policing and self disclosure policy from Marcia Bystryn, Director, Office of Environmental Policy and Management, the Port Authority of NY & NJ	05/30/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-43	06/30/95	Comments on interim self policing and self disclosure policy from Carl Rupert, Raleigh Research Director, Clean Water Fund of North Carolina	04/21/95
II-C-44	06/30/95	Comments on interim self policing and self disclosure policy from Randall Weiner, Senior Attorney, Land and Water Fund of the Rockies, Legal Aid for the Environment	06/15/95
II-C-45	06/30/95	Comments on interim self policing and self disclosure policy from Anne Dobbs, Chair, ASTSWMO Hazardous Waste Enforcement Task Force (Association of State and Territorial Solid Waste Management Officials)	06/30/95
II-C-46	06/30/95	Comments on interim self policing and self disclosure policy from Gale Norton, Attorney General, State of Colorado Department of Law	06/28/95
II-C-47	06/30/95	Comments on interim self policing and self disclosure policy from Russell Harding, Deputy Director, Michigian Department of Natural Resources	06/02/95
II-C-48	06/30/95	Comments on interim self policing and self disclosure policy from Scott Harshburger, Attorney General of Massachusettes	06/27/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. State and Public Agencies	Date of Document
II-C-49	07/20/95	Letter from John Hankinson, Jr., Regional Administrator, Region IV, EPA, to Honorable Harold Brubaker, North Carolina General Assembly, regarding NC's House Bill 817	05/08/95
II-C-50	06/30/95	Comments on interim self policing and self disclosure policy from Rodney Clark, Manager of Safety, Health, and Environmental Protection, Dept of Water and Power, the City of Los Angeles	06/05/95
II-C-51	06/30/95	Comments on interim self policing and self disclosure policy from Wallace Cory, Administrator, Idaho Dept of Health and Welfare, Division of Environmental Quality	06/02/95

Docket # C-94-01	Date Received in Docket	Commentor or Addressee, Title, Description, Etc. Law Firms and Consulting Firms	Date of Document
II-D-01	09/08/94	Statement of Stanley W. Legro, Verner, Lipfert, Bernhard, McPherson and Hand, for EPA Public Meeting on Environmental Auditing, "Environmental Auditing: Should Results be Used by EPA for Enforcement Purposes?"	07/26/94
II-D-02	09/08/94	Statement of Roger L. Lewis, President of Operations and Technology, Diamant Boart, Inc., for EPA Public Meeting on Environmental Auditing	07/27/94
II-D-03	09/08/94	Cornelius C. Smith, Principal, ENVIRON Corporation, U.S. Sub-Tag on Auditing, "ISO 14000 Environmental Auditing and Other Management Standards" Presented to EPA Public Meeting on Environmental Auditing	07/27/94
II-D-04	09/08/94	Statement of Joseph G. Block, Venable, Baetjer, Howard, & Civiletti, for EPA Public Meeting on Environmental Auditing	07/28/94
II-D-05	09/08/94	Statement of Barry M. Hartman, Kirkpatrick & Lockhart, for EPA Public Meeting on Environmental Auditing. Attached is Draft Legislation that Meets the Principles Described in Mr. Hartman's Statement	07/28/94

II-D-06	09/08/94	Statement of Ridgeway M. Hall, Jr., Crowell & Moring, for EPA Public Meeting on Environmental Auditing. Attached is Letter from Mr. Hall to Brian P. Riedel, Office of Compliance, U.S. EPA, Regarding the EPA Public Meeting	07/28/95
II-D-07	06/30/95	Comments on interim self policing and self disclosure policy from Christopher Dolan, Associate with the law firm of Robins, Kaplan, Miller & Ciresi, San Francisco office	06/30/95
II-D-08	06/30/95	Comments on interim self policing and self disclosure policy from Carol Lynn Green, Attorney, law firm of Bryan Cave LLP	06/30/95
II-D-09	06/30/95	Comments on interim self policing and self disclosure policy from Frank White, Vice President, Organization Resources Counselors, Inc.	06/29/95
II-D-10	06/30/95	Comments on interim self policing and self disclosure policy from John D'Aloia, Senior Associate, Prindle-Hinds Environmental Inc	05/12/95
II-D-11	06/23/95	Comments on interim self policing and self disclosure policy from Donald Berschback of the law firm of Clark, Klein & Beaumont, P.L.C.	06/20/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-01	09/08/94	David F. Fisher, Vice President, Associate General Counsel, The Pillsbury Company, and Chair, Environmental Auditing Work Group of the Minnesota Chamber of Commerce, and Daniel O. Schmid, 3M Environmental Engineering and Pollution Control, Breaking Through Barriers. This Report Details the Environmental Audit Program Designed by the Minnesota Chamber of Commerce	undated
II-E-02	09/08/94	Frank B. Friedman, Senior Vice President, Elf Atochem North America, Inc., "Environmental Management for the Future: Environmental Auditing is Not Enough," Cardozo Law Review, Vol. 12:1315, 1991	1991
II-E-03	09/08/94	Pacificorp, Comments on EPA's Environmental Auditing Policy. Pacificorp Recommends that No Change be Made to Existing Policy	07/19/94
II-E-04	09/08/94	Letter from Mark V. Stanga, Environmental Affairs Counsel, Litton Industries, Inc., to Brian P. Riedel and Ira R. Feldman, Office of Compliance, U.S. EPA, Regarding EPA's Reconsideration of its 1986 Environmental Auditing Policy	07/22/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-05	09/08/94	Letter from Frank P. Prager, Corporate Counsel, The Gates Corporation, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Supporting State Environmental Audit Privilege Laws	07/25/94
II-E-06	09/08/94	Letter from Scott B. Smith, Director, Environmental, Health and Safety Policy, Coors Brewing Company, to Brian P. Riedel and Ira R. Feldman, Office of Compliance, U.S. EPA, Regarding Coors Views on the Benefits Resulting from the Enactment of Colorado's S.B. 94-139. Attached is a Brief Overview of Colorado's Self-Evaluation Privilege/Voluntary Disclosure Legislation and Letter from Jack W. McGraw, Acting Regional Administrator to Colorado Governor Roy Romer Expressing U.S. EPA's Concerns Regarding This Legislation (4/29/94)	07/26/94
II-E-07	09/08/94	Letter from James H. Johnston, Session Chair, Air & Waste Management Association's Annual Meeting Technical Program Committee, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Soliciting Mr. Feldman to Present a Paper on Standards, Criteria and Requirements of Environmental Audit Programs	07/26/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-08	09/08/94	Letter from John C. Williams, Manager, Regulatory Affairs, USPCI (Subsidiary of Union Pacific Corporation) to Steve A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, Supporting Voluntary Disclosure Privilege	07/26/94
II-E-09	09/08/94	Statement of Frank B. Friedman, Senior Vice President, Elf Atochem North America, Inc., for EPA Public Meeting on Environmental Auditing	07/27/94
II-E-10	09/08/94	Statement of Thomas C. Jorling, Vice President, Environmental Affairs, International Paper Company, for EPA Public Meeting on Environmental Auditing	07/28/94
II-E-11	09/08/94	Statement of Lon F. Tullos, Senior Environmental Coordinator, Huntsman Corporation, Representing the Voluntary Protection Program Participants Association, for EPA Public Meeting on Environmental Auditing	07/28/94
II-E-12	09/08/94	Statement of AT&T for EPA Public Meeting on Environmental Auditing	07/28/94
II-E-13	09/08/94	Statement of Robert P. Vignes, Ph.D., Director, Safety, Hygiene & Environment, Ciba-Geigy Corporation, for EPA Public Meeting on Environmental Auditing	07/28/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-14	09/08/94	Statement of Tommie George, Worldwide Environmental Assurance Manager, Sperry-Sun Drilling Services, for EPA Public Meeting on Environmental Auditing	07/28/94
II-E-15	09/08/94	Statement of WMX Technologies for EPA Public Meeting on Environmental Auditing	07/28/94
II-E-16	09/08/94	Statement of Gregory J. Odegard, Director, Environmental Affairs Department, El Paso Natural Gas, for EPA Public Meeting on Environmental Auditing	07/28/94
II-E-17	05/31/95	Comments on interim self policing and self disclosure policy from Michael Byington, Senior Environmental Specialist, The North American Coal Corporation	05/26/95
II-E-18	06/30/95	Comments on interim self policing and self disclosure policy from James Banks, WMX Technologies	07/06/95
II-E-19	06/30/95	Comments on interim self policing and self disclosure policy from Wayne Swallow, Manager, Compliance Auditing, CINergy Corporation	06/28/95
II-E-20	06/30/95	Comments on interim self policing and self disclosure policy from Bruce Adler, Senior EHS Counsel, General Electric Corporation	06/30/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-21	06/30/95	Comments on interim self policing and self disclosure policy from Timothy Mohin, Government Affairs Manager, Environment, Health and Safety, Intel Corporation	06/30/95
II-E-22	06/30/95	Comments on interim self policing and self disclosure policy from Jordan Jacobsen, Senior Attorney, Alyeska Pipeline Service Company	06/28/95
II-E-23	06/30/95	Comments on interim self policing and self disclosure policy from Elizabeth Stolpe, Manager, Environmental Affairs, Koch Industries Incorporated	06/30/95
II-E-24	06/30/95	Comments on interim self policing and self disclosure policy from Michael Gallagher, Manager - EHS Auditing, Texaco Inc	06/29/95
II-E-25	06/29/95	Comments on interim self policing and self disclosure policy from Kenneth Kasper, Director, Corporate Environmental Audits, Schering-Plough Corporation	06/27/95
II-E-26	06/01/95	Comments on interim self policing and self disclosure policy from William Howard, Vice President-Environmental Engineering and Technical Support, Georgia-Pacific Corporation	05/30/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-27	06/30/95	Comments on interim self policing and self disclosure policy from Timothy Shean, Vice President, Chemical Products Division, Sandvik Rock Tools Corp	04/28/95
II-E-28	06/09/95	Comments on interim self policing and self disclosure policy from Greg Schaefer, Director, Government Issues and Analysis, ARCO Coal Company	06/05/95
II-E-29	06/05/95	Comments on interim self policing and self disclosure policy from David Heller, Executive Director, Environmental Health and Safety, US West Company	06/01/95
II-E-30	06/02/95	Comments on interim self policing and self disclosure policy from Steven Cook, Environmental & Litigation Counsel, Lyondell Petrochemical Company	06/02/95
II-E-31	06/30/95	Comments on interim self policing and self disclosure policy from Leslie Carothers, Vice President, Environment, Health & Safety, United Technologies Corp	06/29/95
II-E-32	06/30/95	Comments on interim self policing and self disclosure policy from David Howe, Senior Attorney, Caterpillar Corp	06/30/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-33	06/30/95	Comments on interim self policing and self disclosure policy from Barbara Lindsey Sims, Vice President - Environmental Litigation and Regulation, Safety-Kleen Corp	06/29/95
II-E-34	06/30/95	Comments on interim self policing and self disclosure policy from Brenda Tollett, Environmental Group Counsel, Valvoline Company	06/29/95
II-E-35	06/29/95	Comments on interim self policing and self disclosure policy from Robert Lamb, Law Offices of Wright & Talisman, P.C., submitted on behalf of Potlatch Corporation, to Carol Browner, Administrator, EPA	06/29/95
II-E-36	06/30/95	Comments on interim self policing and self disclosure policy from Scott Smith, Director, Environmental Health & Safety, Coors Brewing Company	05/23/95
II-E-37	05/30/95	Comments on interim self policing and self disclosure policy from Roland Gow, Manager, Environmental Affairs, Questar Corporation	05/25/95
II-E-38	06/05/95	Comments on interim self policing and self disclosure policy from Vincent Dee, Environmental Staff Advisor, Exxon Research and Engineering Company	06/01/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-39	06/02/95	Comments on interim self policing and self disclosure policy from James Squires, Norfolk Southern Corp	05/31/95
II-E-40	06/05/95	Comments on interim self policing and self disclosure policy from Mark Duvall, Law Department, Health and Safety Counsel, Union Carbide Corp	06/01/95
II-E-41	06/05/95	Comments on interim self policing and self disclosure policy from Frances Magelssen, Senior Environmental Engineer, Uniroyal Chemical Company Inc	05/30/95
II-E-42	06/30/95	Comments on interim self policing and self disclosure policy from Lee Anne Elliott, Executive Director, Voluntary Protection Programs Participants Association (VPP)	06/30/95
II-E-43	06/29/95	Comments on interim self policing and self disclosure policy from M.J. Rick Hager, Corporate Environmental Services, Tampa Electric	06/26/95
II-E-44	05/31/95	Comments on interim self policing and self disclosure policy from Skiles Boyd, Administrator, Hazardous & Toxic Programs, Detroit Edison	05/24/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-45	06/13/95	Comments on interim self policing and self disclosure policy from Garry Rice, Assistant General Counsel, Duke Power	06/05/95
II-E-46	06/13/95	Comments on interim self policing and self disclosure policy from William Holzhauer, Managing Counsel, Niagara Mohawk Power Corp	06/12/95
II-E-47	06/30/95	Comments on interim self policing and self disclosure policy from Michael Atherton, Environmental Affairs Dept, Columbia Gas Corp	06/26/95
II-E-48	06/30/95	Comments on interim self policing and self disclosure policy from Thomas Budge, Office of the Associate General Counsel, IBM Corp	06/30/95
II-E-49	06/28/95	Comments on interim self policing and self disclosure policy from Vincent Lajiness, Director, Environmental Legislative and Regulatory Affairs, Coastal Corp	06/26/95
II-E-50	06/30/95	Comments on interim self policing and self disclosure policy from Gertrude Kelly, Environmental Attorney, Ashland Chemical	06/29/95
II-E-51	06/30/95	ooo Lyle Nelson, Manager, Environmental Programs, Southern California Edison Company	06/29/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-52	06/30/95	Comments on interim self policing and self disclosure policy from Richard White, VP, Environmental Services, Texas Utilities Services Inc.	06/29/95
II-E-53	06/30/95	Comments on interim self policing and self disclosure policy from Renata Manzo, Reynolds Metals Company	06/25/95
II-E-54	06/30/95	Comments on interim self policing and self disclosure policy from William White of the law firm Moore & Van Allen, PLLC, on behalf of three unnamed business organizations	06/29/95
II-E-55	06/30/95	Comments on interim self policing and self disclosure policy from W. Jeffrey Pardue, C.E.P., Chairman, Florida Electric Power Coordinating Group Inc.	06/29/95
II-E-56	06/02/95	Comments on interim self policing and self disclosure policy from W. Jeffrey Pardue, Director, Environmental Services Department, Florida Power Corp	05/23/95
II-E-57	06/02/95	Comments on interim self policing and self disclosure policy from Michael Terraso, Director, Environmental Affairs, Enron Operations Corp.	06/01/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individual Companies	Date of Document
II-E-58	06/30/95	Comments on interim self policing and self disclosure policy from R. Stanley Lowe, Counsel, Law Department, True Companies	06/06/95
II-E-59	06/30/95	Comments on interim self policing and self disclosure policy from Susan Callaghan, Legal Department, Montana Power Company	06/27/95
II-E-60	06/29/95	Comments on interim self policing and self disclosure policy from William Ellis, Coordinator, Environmental and Safety Dept, Planning and Issue Coordinator, Exxon Company, U.S.A.	06/28/95
II-E-61	06/30/95	Comments on interim self policing and self disclosure policy from Dennis O'Regan, Manager-Environmental, GPU Service Corp	06/01/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-01	09/08/94	Comments of the Kentucky Chamber of Commerce Regarding Kentucky's Environmental Audit Privilege Law and How it Relates to EPA's 1986 Policy Statement on Environmental Auditing	undated
II-F-02	09/08/94	Statement of the Indiana Chamber of Commerce Concerning Indiana's Environmental Audit Privilege with Attachments: (1) Indiana Senate Enrolled Act No. 417; (2) Letter from Valdas V. Adamkus, Regional Administrator, U.S. EPA, to Jeffery Stant, Executive Director, Hoosier Environmental Council (6/14/94); (3) Office of RCRA Comments on Impact of Senate Enrolled Act No. 417 on Indiana's Authorized Hazardous Waste Program; (4) Air and Radiation Division Analysis of Act No. 417; and (5) Water Division Review of Hoosier Environmental Council Correspondence Relating to Indiana Water Pollution Control Programs	07/20/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-03	09/08/94	Letter with Attachments from John L. Wittenborn, Counsel for Coalition for Improved Environmental Audits (CIEA), to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Containing Comments Intended to Supplement Statement and Written Submissions by CIEA Chairman, James T. O'Reilly. Attachments Include: (1) Letter from Gail Ginsburg, Acting Regional Counsel, to Kathy Prosser, Commissioner, Indiana Department of Environmental Management; (2) Letter from John L. Wittenborn and Stephanie Siegel, Counsel, CIEA, to Tracey Dickerson, U.S. Sentencing Commission; (3) the CIEA Roster; (4) Two Related Articles in Corporate Conduct Quarterly, Winter 1992 -- "Compliance on Ice: How Litigation Chills Compliance Programs" authored by Joseph E. Murphy, Senior Attorney at Atlantic Bell and "What Compliance Review Activity Does Litigation Chill?" Written by Richard Gruner, Professor of Law at Whittier College School of Law; (5) CIEA White Paper Supporting Qualified Self-Evaluation Privilege for Internal Environmental Audits (7/27/94); (6) Overview of Environmental Audit Privilege by State; and (7) "Comparison of State Audit Privilege	07/26/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-04	09/08/94	Comments of the Edison Electric Institute for EPA's Public Meeting on Environmental Auditing Policy	07/27/94
II-F-05	09/08/94	Statement of Corporate Environmental Enforcement Council (CEEC), Submitted by Paul G. Wallach and Sloane E. Anders, Counsel, for EPA Public Meeting on Environmental Auditing and CEEC Comments on the Draft Organizational Sentencing Guidelines for Environmental Offenses Which Were Filed with the U.S. Sentencing Commission on 7/25/94	07/27/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-06	09/08/94	Letter from Cynthia Goldman Representing the Colorado Association of Commerce and Industry (CACI) to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Regarding Colorado Senate Bill 94-139 and EPA's 1986 Environmental Auditing Policy. Attached are (1) Copies of Senate Bill 94-139, (2) Letter from Michael Feeley, Colorado State Senate Minority Leader, to Ira R. Feldman Regarding Environmental Auditing Privilege and Voluntary Disclosure Provisions in Senate Bill 94-139 (7/25/94), (3) Letter from Tom Norton, President of Colorado Senate, Timothy Foster, Majority Leader, Colorado House of Representatives, and Al Meiklejohn, Senate Bill Sponsor, to Ira R. Feldman Regarding Environmental Auditing Privilege and Voluntary Disclosure Provisions in Senate Bill 94-139 (7/22/94), and (4) Pollution Prevention Practices and Attitudes: A Survey of Colorado's Small and Medium-Sized Businesses (June 1994) 07/27/94	07/27/94
II-F-07	09/08/94	Statement of Environmental Auditing Roundtable (EAR) for EPA Public Meeting on Environmental Auditing	07/27/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-08	09/08/94	Statement of James T. O'Reilly, Chairman, Coalition for Improved Environmental Audits (CIEA) for EPA Public Meeting on Environmental Auditing	07/27/94
II-F-09	09/08/94	Statement of James M. Whitty, Legislative Representative, Associated Oregon Industries, for EPA Public Meeting on Environmental Auditing. Attached is Letter from Fred Hanson, Director, Oregon Department of Environmental Quality, to Steve Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, Regarding Limited Environmental Audit Privilege in Oregon Senate Bill 912 (7/25/94) and Letter from John C. Bradley, First Assistant, District Attorney, Multnomah County to James M. Whitty, Regarding Mr. Bradley's Views on Oregon's Environmental Audit Privilege (7/25/94)	07/27/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-10	09/08/94	Statement of Indiana Manufacturers Association (IMA) and National Association of Manufacturers (NAM), Submitted by Blake Jeffery, IMA Director of Environmental Affairs, and Thomas Barnard, Chair, IMA Legal & Technical Subcommittee, for EPA Public Meeting on Environmental Auditing. Attached is Letter from Beverly Gard, Indiana State Senator, to Brian P. Riedel, Office of Compliance, U.S. EPA, Regarding Intent of Drafting Indiana Senate Enrolled Act No. 417 (7/22/94)	07/27/94
II-F-11	09/08/94	Statement of Deborah M. Atwood, American Meat Institute, for EPA Public Meeting on Environmental Auditing	07/27/94
II-F-12	09/08/94	Statement, with Exhibits, of The Compliance Management and Policy Group for EPA Public Meeting on Environmental Auditing	07/27/94
II-F-13	09/08/94	Statement of Frank J. Priznar, Roy F. Weston, Inc., and William Roger Truitt, Piper & Marbury, for EPA Public Meeting on Environmental Auditing. Statement Addressed ASTM Standard Practice for Environmental Regulatory Compliance Auditing	07/28/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-14	06/30/95	Comments on interim self policing and self disclosure policy from Richard Jarman, Director, Technical Regulatory Affairs, National Food Processors Association	06/29/95
II-F-15	06/30/95	Comments on interim self policing and self disclosure policy from Cindy Evans, Environmental Counsel, American Forest and Paper Association	06/30/95
II-F-16	06/30/95	Comments on interim self policing and self disclosure policy from Jean Beaudoin, Chairman, Battery Council International	06/30/95
II-F-17	06/06/95	Comments on interim self policing and self disclosure policy from Fred Sembach, Vice President, Government Affairs, Pennsylvania Chamber of Business and Industry	06/01/94
II-F-18	06/02/95	Comments on interim self policing and self disclosure policy from Richard Ketler, Managing Director, Environmental Affairs, Air Transport Association	06/02/95
II-F-19	06/28/95	Comments on interim self policing and self disclosure policy from Phyllis Levine, Senior Counsel, American Gas Association	06/27/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-20	06/28/95	Comments on interim self policing and self disclosure policy from Mary Legatski, Vice President, Public Affairs, Synthetic Organic Chemical Manufacturers Association, Inc	06/28/95
II-F-21	06/30/95	Comments on interim self policing and self disclosure policy from the Kentucky Chamber of Commerce, prepared by Breeding, McIntyre & Cunningham, P.S.C.	UNDATED
II-F-22	06/30/95	Comments on interim self policing and self disclosure policy from Melissa Carey, Director, Government Relations, Electronic Industries Association	06/30/95
II-F-23	06/30/95	Comments on interim self policing and self disclosure policy from C. Richard Bozek, Manager, Environmental Programs, Edison Electric Institute	06/30/95
II-F-24	06/30/95	Comments on interim self policing and self disclosure policy from Peter McHugh of Collier, Shannon, Rill & Scott on behalf of the Steel Manufacturers Association	06/30/95
II-F-25	06/30/95	Comments on interim self policing and self disclosure policy from Peter McHugh of Collier, Shannon, Rill & Scott on behalf of Specialty Steel Industry of North America	06/30/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-26	06/30/95	Comments on interim self policing and self disclosure policy from Peter McHugh of Collier, Shannon, Rill & Scott on behalf of the Leather Industries of America, Inc	06/30/95
II-F-27	06/30/95	Comments on interim self policing and self disclosure policy from Timothy Feldman, Vice President, Government Affairs, National Electrical Manufacturers Association	06/27/95
II-F-28	06/30/95	Comments on interim self policing and self disclosure policy from Kevin Tighe of Tighe, Patton, Tabackman & Babbin, Attorneys at Law on behalf of the National Automotive Radiator Service	05/05/95
II-F-29	06/05/95	Comments on interim self policing and self disclosure policy from Paula Rowe, Director, Exploration and Production, Rocky Mountain Oil & Gas Association	06/01/95
II-F-30	06/05/95	Comments on interim self policing and self disclosure policy from Theodore Kinne, Vice President, Environment, Safety and Operations, Interstate Natural Gas Association of America (INGAA)	06/02/95

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Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-31	06/05/95	Comments on interim self policing and self disclosure policy from Richard Lawson, President and CEO, National Mining Association	06/02/95
II-F-32	06/05/95	Comments on interim self policing and self disclosure policy from Craig Campbell, Director, Environmental Affairs, Cement Kiln Recycling Coalition	06/02/95
II-F-33	06/05/95	Comments on interim self policing and self disclosure policy from Douglas Greenhaus, Director, Environment, Health & Safety, National Automobile Dealers Association (NADA)	06/02/95
II-F-34	06/29/95	Comments on interim self policing and self disclosure policy from Brian Bursiek, Director, Feed Production, American Feed Industry Association (AFIA)	06/26/95
II-F-35	06/23/95	Comments on interim self policing and self disclosure policy from Kathy Bailey, American Automobile Manufacturers Association	06/23/95
II-F-36	06/30/95	Comments on interim self policing and self disclosure policy from William Marx, President, Council of Industrial Boiler Owners (CIBO)	06/30/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-37	06/30/95	Comments on interim self policing and self disclosure policy from Ralph Colleli, Jr., American Petroleum Institute	06/30/95
II-F-38	06/30/95	Comments on interim self policing and self disclosure policy from Peter McHugh of the law firm of Collier, Shannon, Rill & Scott on behalf of the Coalition for Improved Environmental Audits	06/30/95
II-F-39	06/30/95	Comments on interim self policing and self disclosure policy from Nancy Newkirk of the law firm Perkins Coie on behalf of the Compliance Management and Policy Group (CMPG)	06/30/95
II-F-40	06/30/95	Comments from Richard Robinson, Executive VP, Hazardous Waste Management Association (Environmental Industry Associations - EIA)	06/28/95
II-F-41	06/30/95	Comments on interim self policing and self disclosure policy from Paul Wallach of the law firm of Hale and Dorr, on behalf of the Corporate Environmental Enforcement Council	06/30/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-42	06/29/95	Comments on interim self policing and self disclosure policy from Bonnie Wilson, Director, Airport Facilities & Services - ACI-NA, and David Jeffrey, Staff VP, Environmental Affairs & Airport Projects - AAAE	05/31/95
II-F-43	06/29/95	Comments on interim self policing and self disclosure policy from Robert Lamb of the law firm Wright & Talisman, P.C. on behalf of the Virginia Oil & Gas Association (VOGA)	06/29/95
II-F-44	06/30/95	Comments on interim self policing and self disclosure policy from Kent Anderson, Executive Director, International Institute of Ammonia Refrigeration (IIAR)	06/30/95
II-F-45	06/30/95	Comments on interim self policing and self disclosure policy from Signatory List, the Food Industry Environmental Council	06/30/95
II-F-46	06/30/95	Comments on interim self policing and self disclosure policy from Carlos Moore, Executive VP, American Textile Manufacturers Institute	06/29/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Trade Associations and Auditing Groups	Date of Document
II-F-47	06/01/95	Comments on interim self policing and self disclosure policy from Kenneth Johnson, P.E., Duke Energy, EGA Environmental Issues Committee Chair and Margaret Welsh, Executive Director, Electric Generation Association	05/31/95
II-F-48	06/02/95	Comments on interim self policing and self disclosure policy from Thomas Lingan / Saundra Cooksey of the law firm of Venable, Baetjer and Howard, LLP, submitted on behalf of the Manufacturers Association for a Desirable Environment in Maryland	06/01/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Public Interest Groups and Unions	Date of Document
II-G-01	09/08/94	Letter from Brian Andreja, Chair, Political Committee, Sierra Club, Expressing Concern About the Lack of Colorado Environmental Community Testimony Scheduled for EPA Public Meeting on Environmental Auditing	07/26/94
II-G-02	09/08/94	Statement of Adrienne Anderson, Arsenal Action Alliance for EPA Public Meeting on Environmental Auditing	07/27/94
II-G-03	09/08/94	Letter from Glenn G. Lammi, Chief Legal Counsel, Legal Studies Division, Washington Legal Foundation, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, with Attached Legal Studies Division Publications for EPA's Consideration	07/27/94
II-G-04	09/08/94	Letter from Brian Andreja, Chair, Political Committee, Sierra Club, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Opposing the Passage of Colorado's "Environmental Self-Evaluation Bill" (S.B. 94-139)	07/27/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Public Interest Groups and Unions	Date of Document
II-G-05	06/08/95	Letter from Robert Shavelson, Executive Director, Atlantic States Legal Foundation Inc., Written for and on Behalf of Various Groups, to Carol Browner, EPA Administrator, Urging EPA to Oppose any Environmental Audit Policy Which Creates any Privilege to Protect Audit Information	02/06/95
II-G-6	06/08/95	Letter from Ann Powers, VP and General Counsel, Chesapeake Bay Foundation, to Carol Browner, EPA Administrator, Regarding EPA's Environmental Audit Policy and Opposing the Creation of an Evidentiary Privilege to Protect Voluntary Audit Information	02/08/95
II-G-7	06/08/95	Letter from Roy Hoagland, Virginia Assistant Director, Chesapeake Bay Foundation, Written for and on Behalf of Various Groups, to Steven Herman, Assistant Administrator, OECA, Supporting EPA's Position Regarding Virginia's HB No. 1845	02/22/95
II-G-8	06/08/95	Letter from Signatory List, EDF, to Carol Browner, EPA Administrator, and Donald Sadowsky, Office of General Counsel, EPA, Regarding EPA Proposals to Expand Corporate Secrecy Rights Through Aud.t Privileges and FOIA Exemptions	02/24/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Public Interest Groups and Unions	Date of Document
II-G-9	06/08/95	Letter from Robert Shavelson, Executive Director, Atlantic States Legal Foundation, to Carol Browner, EPA Administrator, Regarding and Listing Additional Groups Desiring to Add their Endorsement Opposing any Type of Privilege for Environmental Audits	02/24/95
II-G-10	06/08/95	Letter from Carl Pope, Executive Director, Sierra Club, to Carol Browner, EPA Administrator, Regarding their Opposition to Audit Privileges	02/24/95
II-G-11	06/08/95	Letter from Mark Rubin of Shuford, Rubin & Gibney, P.C., to George Allen, Governor of Virginia, Regarding House Bill 1845	02/24/95
II-G-12	06/08/95	Letter from Craig Johnston, Assistant Professor of Law, Northwestern School of Law, to Steven Herman, Assistant Administrator, OECA, Regarding any Federal and State Efforts to Pass Legislation Providing Environmental Audit Privileges and Immunities	02/28/95
II-G-13	06/30/95	Comments on interim self policing and self disclosure policy from Elizabeth Wessel, Staff Scientist, Citizens for a Better Environment, and Caryl Terrell, Legislative Coordinator, John Muir Chapter, Sierra Club	06/30/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Public Interest Groups and Unions	Date of Document
II-G-14	06/30/95	Comments on interim self policing and self disclosure policy from Darlene Medlar, Chairperson, Western Organization of Resource Councils, as well as other signatory members	06/30/95
II-G-15	05/31/95	Comments on interim self policing and self disclosure policy from Heidi Arbury, Chair, Rocky Mountain Chapter of the Sierra Club	05/31/95
II-G-16	06/30/95	Comments on interim self policing and self disclosure policy from Mitchell Bernard, Natural Resources Defense Council	06/29/95
II-G-17	06/30/95	Comments on interim self policing and self disclosure policy from Carolyn Hartman, Staff Attorney, U.S. Public Interest Research Group and Charles Caldart, Litigation Director, National Environmental Law Center	06/30/95
II-G-18	06/30/95	Comments on interim self policing and self disclosure policy from Robert Shavelson, Atlantic States Legal Foundation	06/29/95
II-G-19	06/01/95	Comments on interim self policing and self disclosure policy from Ken Warren, Secretary, Sierra Club - Harvey Bloom Group	05/27/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Public Interest Groups and Unions	Date of Document
II-G-20	06/29/95	Comments on interim self policing and self disclosure policy from Lucinda Sikes, Attorney at Law, submitted on behalf of Public Citizen Litigation Group	06/27/95
II-G-21	06/29/95	Comments on interim self policing and self disclosure policy from Mark Wenzler, Environmental Enforcement Attorney, Trial Lawyers for Public Justice	06/28/95
II-G-22	06/30/95	Comments on interim self policing and self disclosure policy from Carol Andress, Economic Development Specialist, Environmental Defense Fund (EDF)	06/29/95
II-G-23	06/15/95	Comments on interim self policing and self disclosure policy from Greg Wingard, President, Waste Action Project	06/12/95
II-G-24	06/06/95	Comments on interim self policing and self disclosure policy from James Kotcon, State Government Programs Chair, Sierra Club, West Virginia Chapter	05/27/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Individuals	Date of Comment
II-H-01	06/27/95	Comments on interim self policing and self disclosure policy from B.A. Thompson	06/20/95
II-H-02	06/27/95	Comments on interim self policing and self disclosure policy from Keli Robertson	06/20/95
II-H-03	06/27/95	Comments on interim self policing and self disclosure policy from Diane Schmitz	06/19/95
II-H-04	06/27/95	Comments on interim self policing and self disclosure policy from Dora Fishman	06/15/95
II-H-05	06/27/95	Comments on interim self policing and self disclosure policy from Judisa Brauner	06/16/95
II-H-06	06/27/95	Comments on interim self policing and self disclosure policy from Patricia Newton	06/19/95
II-H-07	06/27/95	Comments on interim self policing and self disclosure policy from Alice Cotton	06/23/95
II-H-08	06/30/95	Comments on interim self policing and self disclosure policy from Aimee Bullard	06/03/95
II-H-09	06/30/95	Comments on interim self policing and self disclosure policy from Page Murphy	06/03/95
II-H-10	06/30/95	Comments on interim self policing and self disclosure policy from Magdalena Eajlciewis	06/03/95

II-H-11	06/30/95	Comments on interim self policing and self disclosure policy from Kathy Triersan	06/03/95
II-H-12	06/30/95	Comments on interim self policing and self disclosure policy from Jason Parke	06/03/95
II-H-13	06/30/95	Comments on interim self policing and self disclosure policy from Marni Rapaport	06/03/95
II-H-14	06/30/95	Comments on interim self policing and self disclosure policy from Gilbert Herrera	06/03/95
II-H-15	06/30/95	Comments on interim self policing and self disclosure policy from Patrick Kittle	06/03/95
II-H-16	06/23/95	Comments on interim self policing and self disclosure policy from Judy Muilenburg	06/21/95
II-H-17	06/26/95	Comments on interim self policing and self disclosure policy from Deborah Kensfowicz	06/00/95
II-H-18	06/27/95	Comments on interim self policing and self disclosure policy from Linda Schafer	06/27/95
II-H-19	06/30/95	Comments on interim self policing and self disclosure policy from Susan Russell	06/03/95
II-H-20	06/23/95	Comments on interim self policing and self disclosure policy from Mark Zubek	06/15/95
II-H-21	06/30/95	Comments on interim self policing and self disclosure policy from Sharon Hawkins	06/00/95

II-H-22	06/19/95	Comments on interim self policing and self disclosure policy from Patricia Mowery	06/12/95
II-H-23	06/23/95	Comments on interim self policing and self disclosure policy from [illegible]	06/19/95
II-H-24	06/23/95	Comments on interim self policing and self disclosure policy from Heather Williams	06/00/95
II-H-25	06/30/95	Comments on interim self policing and self disclosure policy from William Itis	UNDATED
II-H-26	06/30/95	Comments on interim self policing and self disclosure policy from Julie Lathrop	UNDATED
II-H-27	06/30/95	Comments on interim self policing and self disclosure policy from Jennifer Bragar	UNDATED
II-H-28	06/30/95	Comments on interim self policing and self disclosure policy from Tessa Tinkler	UNDATED
II-H-29	06/30/95	Comments on interim self policing and self disclosure policy from Julia Williams	UNDATED
II-H-30	06/30/95	Comments on interim self policing and self disclosure policy from Alan Bodian	UNDATED
II-H-31	06/30/95	Comments on interim self policing and self disclosure policy from Drew Barb	UNDATED
II-H-32	06/30/95	Comments on interim self policing and self disclosure policy from Brian Wesenberg	UNDATED

II-H-33	06/30/95	Comments on interim self policing and self disclosure policy from Susan Campbell	UNDATED
II-H-34	06/30/95	Comments on interim self policing and self disclosure policy from Alexis Penn	UNDATED
II-H-35	06/30/95	Comments on interim self policing and self disclosure policy from David McArthur	UNDATED
II-H-36	06/30/95	Comments on interim self policing and self disclosure policy from Carrie Roslean	UNDATED
II-H-37	06/30/95	Comments on interim self policing and self disclosure policy from Nick Marcello	UNDATED
II-H-38	06/30/95	Comments on interim self policing and self disclosure policy from Mailee Flower	UNDATED
II-H-39	06/30/95	Comments on interim self policing and self disclosure policy from Katie Howenstine	UNDATED
II-H-40	06/30/95	Comments on interim self policing and self disclosure policy from Dianne Buerbach	UNDATED
II-H-41	06/30/95	Comments on interim self policing and self disclosure policy from Steve Schultheis	07/13/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Additional Comments Received From Persons Outside of the EPA	Date of Document
IV-D-01	09/08/94	Letter from Gary S. Rice, Duke Power Company, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Advocating Audit Privilege and Simple Safe Harbor Provision	08/05/94
IV-D-02	09/08/94	Additional Comments of Sanford Lewis, Director, Good Neighbor Project for Sustainable Industries, Regarding EPA Auditing Policy, with Attachments	08/06/94
IV-D-03	09/08/94	Letter from Frank P. Prager, Corporate Counsel, The Gates Corporation, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Regarding Statements made by Speakers at EPA Public Meeting on Environmental Auditing	08/08/94
IV-D-04	09/08/94	Letter from Kenneth Kasper, Director, Corporate Environmental Audits and Terry Stewart, Vice-President, Environmental and Engineering Affairs, Schering-Plough to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Responding to June 20 Federal Register Notice: Comments on EPA's Environmental Audit Policy	09/09/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Additional Comments Received From Persons Outside of the EPA	Date of Document
IV-D-05	09/08/94	Letter from Cynthia Goldman On Behalf of Colorado Association of Commerce and Industry, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Regarding Supplemental Comments to EPA Public Meeting on Environmental Auditing	08/10/94
IV-D-06	09/08/94	Comments of the Coalition for Clean Air Implementation on EPA's Environmental Audit Policy	08/10/94
IV-D-07	09/08/94	Letter from M. Frank Powell, Senior Vice President, Government and Corporate Affairs, Coastal Corporation, to Ira R. Feldman, Special Counsel, Office of Compliance, U.S. EPA, Encouraging EPA to Include Audit and Voluntary Disclosure Privileges in its 1986 Environmental Auditing Policy	08/10/94
IV-D-08	09/08/94	Letter from Carolyn Hartman, Staff Attorney, U.S. Public Interest Research Group, to Carol Browner, Administrator, U.S. EPA, Expressing Strong Opposition to Voluntary Disclosure Privilege	08/10/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Additional Comments Received From Persons Outside of the EPA	Date of Document
IV-D-09	09/08/94	Letter from Charles C. Caldart, Litigation Director, and Hillel Gray, Policy Director, National Environmental Law Center, to Carol Browner, Administrator, U.S. EPA, Opposing Proposal by Coalition of Corporations to Grant Civil and Criminal Immunity for Violations Revealed in Environmental Audits	08/10/94
IV-D-10	09/08/94	Statement of Donald Holmstrom, President, Oil, Chemical & Atomic Workers, on Environmental Auditing Policy	08/11/94
IV-D-11	09/08/94	Letter from Laura Hunter, Director, Clean Bay Campaign, to Carol Browner, Administrator, U.S. EPA, Advocating the Strengthening of EPA Auditing Policy	08/11/94
IV-D-12	09/08/94	Letter from Robert W. Shavelson, Executive Director, Atlantic States Legal Foundation, to Carol Browner, Administrator, U.S. EPA, Urging EPA not to Expand Confidentiality and Privilege Protection of Environmental Audits	08/11/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Additional Comments Received From Persons Outside of the EPA	Date of Document
IV-D-13	09/08/94	Letter from Mark L. Peak, Senior Environmental Engineer, Ecology and Environment, Inc., to Michael Stahl, Office of Enforcement and Compliance Assurance, U.S. EPA, Supporting a Limited Immunity from Major Penalties for Companies that Make a Good Faith Effort to Comply	08/11/94
IV-D-14	09/08/94	Comments of the American Gas Association on EPA's Environmental Auditing Policy	08/11/94
IV-D-15	09/08/94	Post-Meeting Statement of the American Petroleum Institute Regarding EPA Public Meeting on Environmental Auditing Policy, and Related Environmental Compliance, Self-Evaluation and Disclosure Issues	08/11/94
IV-D-16	09/08/94	Letter from Thomas W. Stephens, Goodman, Lister & Peters, P.C., to Carol Browner, Administrator, EPA, Opposing Institution of Environmental Audit Privilege	08/18/94
IV-D-17	09/08/94	Letter from Kathy Bailey, Attorney, American Automobile Manufacturers Association, to Brian P. Riedel, Office of Compliance, U.S. EPA, with Attachment of Federal Aviation Administration (FAA) Compliance/Enforcement Bulletin No. 90-6	08/22/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Additional Comments Received From Persons Outside of the EPA	Date of Document
IV-D-18	09/08/94	Comments of Interstate Natural Gas Association of America (INGAA) Supporting Use of Self-Audit Privileges and Voluntary Disclosure Privileges	08/25/94
IV-D-19	05/31/95	Comments on interim self policing and self disclosure policy from Roger Diedrich	UNDATED

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Transcript of Public Meeting	Date of Document
IV-F-01	09/12/94	Transcript of EPA Public Meeting on Environmental Auditing, July 27-28, 1994	09/09/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Supplementary Comments	Date of Document
IV-G-01	09/29/94	Comment submitted by M. Harbordt of Temple-Inland Forest Products Corp	07/07/94
IV-G-02	09/29/94	Comment submitted by Community/Labor Refineries Tracking Committee c/o Clean Water Action	08/25/94
IV-G-03	09/29/94	Comment submitted by R. Collings of Morgan, Lewis & Bockius	08/25/94
IV-G-04	09/29/94	Comment submitted by D. Dunn of Holme Roberts & Owen on behalf of Martin Marietta Corporation	08/26/94
IV-G-05	09/29/94	Comment submitted by D. Zoll of Chemical Manufacturers Association (CMA)	08/30/94
IV-G-06	09/29/94	Comment submitted by C. Smith	09/09/94
IV-G-07	01/05/95	Comment submitted by M. Duffy, Assistant General Counsel, National Coal Association	10/18/94
IV-G-08	01/05/95	Comment submitted by V.S. Johnson, District Attorney General, Davidson County, TN, Chairman, NDAA Environmental Protection Committee and M.R. Capizzi, District Attorney, Orange County, CA, Vice-Chairman, NDAA Environmental Protection Committee	09/30/94
IV-G-09	01/05/95	Comment submitted by G. Trask, District Attorney, Riverside County, CA	12/01/94
IV-G-10	01/05/95	Comment submitted by California District Attorneys Association	10/13/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Supplementary Comments	Date of Document
IV-G-11	01/05/95	Comment submitted by California District Attorneys Association, Environmental Protection Committee	11/94
IV-G-12	02/09/95	Comment submitted by M.V. Stanga, Environmental Affairs Counsel, Litton Industries, Inc.	12/23/94
IV-G-13	02/09/95	Comment submitted by Robert W. Shavelson, Executive Director, Atlantic States Legal Foundation, Inc.	02/02/95
IV-G-14	02/09/95	Comment submitted by S. Harshbarger, Attorney General, The Commonwealth of Massachusetts	02/02/95
IV-G-15	07/17/95	Comments on interim self policing and self disclosure policy from Steve Schultheis	07/13/95
IV-G-16	07/17/95	Comments on interim self policing and self disclosure policy from Tom Bispham, Chairman, STAPPA Enforcement Committee and Curt Marshall, Chairman, ALAPCO Enforcement Committee	07/11/95
IV-G-17	07/13/95	Comments on interim self policing and self disclosure policy from Marion Kundiger	07/07/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Additional Items Considered	Date of Document
VIII-1	09/08/94	Federal Register Notice: Final Environmental Auditing Policy Statement (51 FR 25004, July 9, 1986)	07/09/86
VIII-2	09/08/94	Environmental Protection Agency: EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements	11/14/86
VIII-3	09/08/94	Department of Justice: Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator	07/01/91
VIII-4	09/08/94	U.S. Sentencing Commission: Draft Corporate Sentencing Guidelines for Environmental Violations	11/16/93
VIII-5	09/08/94	Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement to All EPA Employees Working in Support of the Criminal Enforcement Program: Guidance on the Exercise of Investigative Discretion	01/12/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Additional Items Considered	Date of Document
VIII-6	09/08/94	Letter from Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, to EPA Assistant Administrators, Regional Administrators, Regional Counsel, and OECA Office Directors, Describing OECA's Plan to Reassess Current Environmental Auditing Policy	05/13/94
VIII-7	09/08/94	Federal Register Notice of the July 27-28, 1994 Public Meeting on Environmental Auditing (59 FR 31914, June 20, 1994)	06/20/94
VIII-8	09/08/94	Federal Register Notice: Request for Environmental Leadership Program Pilot Project Proposals (59 FR 32062, June 21, 1994)	06/21/94
VIII-9	09/08/94	Letter from Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, to EPA Assistant Administrators, Regional Administrators, Regional Counsel, and OECA Office Directors, Listing Members of EPA Workgroup Examining Options on Auditing Policy	06/21/94
VIII-10	09/08/94	Federal Register Notice: Restatement of Policies Related to Environmental Auditing (59 FR 8455, July 28, 1994)	07/28/94
VIII-11	01/05/95	Summary of Environmental Auditing Policy Workgroup Meeting of 10/06-07/94	10/06-07/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Additional Items Considered	Date of Document
VIII-12	02/01/95	Federal Register Notice: Open Mike Session on Environmental Auditing; Announcement of Environmental Auditing Policy Docket (60 FR 3639, January 18, 1995)	01/18/95
VIII-13	02/15/95	Open Mike Session on Environmental Auditing Transcript of Proceedings, January 20, 1995, San Francisco, CA	01/20/95
VIII-14	02/15/95	Agenda, list of attendees, and slides from Environmental Auditing Focus Group Meeting, January 19, 1995, San Francisco, CA	01/19/95
VIII-15	06/27/95	Moved to VIII-A-73	04/20/95 03/20/95 03/01/95
VIII-16	06/27/95	Moved t VIII-A-74	
VIII-17	06/27/95	Memorandum from Brian Riedel, Deputy Special Counsel, Office of Compliance, to Regional Counsels, Regarding State Audit Privilege Legislation Update	UNDATED
VIII-18	06/27/95	Moved to VIII-A-75	UNDATED

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Basic Documents	Date of Document
VIII-A-01	09/30/94	Memorandum from S. Herman, A.A. for Enforcement and Compliance Assurance, U.S. EPA to A.A's, R.A.'s, Regional Counsel and OECA Office Directors	06/21/94
VIII-A-02	09/30/94	Memorandum from J. McGraw, Acting Regional Administrator, Region VIII, U.S. EPA to R. Romer, Governor, State of Colorado	04/29/94
VIII-A-03	09/30/94	Memorandum from E. Reich, Acting Assistant Administrator, Office of Enforcement and Compliance Monitoring, U.S. EPA to W. Pound, Executive Director, National Conference of State Legislatures	06/14/94
VIII-A-04	09/30/94	Memorandum from G. Ginsburg, Regional Counsel, Region V, U.S. EPA to K. Prosser, Commissioner, Indiana Department of Environmental Management	01/19/94
VIII-A-05	09/30/94	Memorandum from J. Fox, Regional Counsel, Region 10 U.S. EPA to H. Tate, Assistant Administrator for Enforcement, U.S. EPA	03/25/92
VIII-A-06	09/30/94	Memorandum from E. Devaney, Director, Office of Criminal Enforcement, U.S. EPA to Advisory Working Group on Environmental Sanctions, U.S. Sentencing Commission	04/09/93
VIII-A-07	09/30/94	Memorandum from M. Penders to E. Schaeff, I. Feldman, J. Fogerty and M. Marshal regarding the Appropriations Conference	08/18/94

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VIII-A-08	09/30/94	BNA Analysis and Perspective article entitled "Environmental Audit Privilege: Oregon's Experiment" by Lindley, Thomas E. and Hodson, Jerry B.	01/28/94
VIII-A-09	09/30/94	Congressional Record of 08/08/94, pages S10942-S10947	08/08/94
VIII-A-10	09/30/94	State Senate Bill 94-139, State of Colorado	05/10/94
VIII-A-11	09/30/94	Burns Indiana Statutes Annotated	1994
VIII-A-12	09/30/94	General Assembly, Commonwealth of Kentucky, House Bill No. 681	03/29/94
VIII-A-13	09/30/94	Report to the U.S. EPA entitled "Benefits to Industry of Environmental Auditing" by the Center for Environmental Assurance, Arthur D. Little, Inc.	08/93
VIII-A-14	09/30/94	Report to the U.S. EPA and the U.S. Army Material Command entitled "Environmental Auditing Workshop, June 17-21, 1985" by the Center for Environmental Assurance, Arthur D. Little, Inc.	08/85
VIII-A-15	09/30/94	Report to the U.S. EPA entitled "Benefits of Environmental Auditing, Case Examples" by the Center for Environmental Assurance, Arthur D. Little, Inc.	12/94

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Basic Documents	Date of Document
VIII-A-16	09/30/94	Environmental Audit Issue Paper: Duties to Report or Disclose Information on the Environmental Aspects of Business Activities, prepared by the Environmental Law Institute for the Regulatory Reform Staff, U.S. EPA	09/84, revised 09/85
VIII-A-17	09/30/94	Enforcement in the 1990's Project: Using Innovative Enforcement Tools	undated
VIII-A-18	09/30/94	Selected Current Practices in Property Transfer Environmental Assessment, Office of Policy, Planning and Evaluation (OPPE), U.S. EPA	03/89
VIII-A-19	09/30/94	Case Study on the Environmental Compliance Auditing Program of the City of Colorado Springs, CO, prepared by Cox, Joan M., Technical Resources, Inc. for the Compliance Policy and Planning Branch, Office of Enforcement, U.S. EPA	12/31/90
VIII-A-20	09/30/94	Cooperative Environmental Management (CEM) Message	09/01/89
VIII-A-21	09/30/94	Environmental Auditing: Sources of Information and Training prepared for the Regulatory Innovations Staff, Office of Policy, Planning and Evaluation (OPPE), U.S. EPA	03/88

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VIII-A-22	09/30/94	Annotated Bibliography on Environmental Auditing prepared for the Regulatory Innovations Staff, Office of Policy, Planning and Evaluation (OPPE), U.S. EPA	03/88
VIII-A-23	09/30/94	Toxic Substances Control Act (TSCA) Section 8(e) Compliance Audit Program Fact Sheet	undated
VIII-A-24	09/30/94	Memorandum from James M. Strock, Assistant Administrator, Office of Enforcement, U.S. EPA to R.A.'s, Deputy R.A.'s, Regional Counsels, Regional Program Division Dir.'s, A.A.'s, General Counsel, Program Compliance Directors and Associate Enforcement Counsels	undated
VIII-A-25	09/30/94	U.S. District Court, District of Connecticut, U.S. and Timothy R.E. Keeney, Commissioner of Environmental Protection of the State of Connecticut v.United Technologies Corporation Audit Agreement	undated
VIII-A-26	09/30/94	Memorandum from S. Herman, A.A. for Enforcement and Compliance Assurance, U.S. EPA to A.A's, R.A.'s, Deputy R.A.'s, General Counsel, and Regional Counsel	08/12/94

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VIII-A-27	09/30/94	Wall Street Journal newspaper article accompanied by a reprint from the Law of Environmental Protection published by Clark, Boardman, Callaghan entitled "Environmental Auditing Provisions in Consent Decrees and Orders"	undated
VIII-A-28	09/30/94	Overview of Environmental Protection Agency's Policies and Programs on Environmental Auditing by Robert Van Heuvelen, Director of Civil Enforcement and Linda Breggin, Special Assistant, Office of Enforcement, U.S. EPA as presented to the American Bar Association's Section of Natural Resources, Energy and Environmental Law at the 22nd Annual Conference on Environmental Law, 03/11-14/93	03/11-14/93
VIII-A-29	09/30/94	Corporate Attitudes Toward Auditing by William A. Yodis, Manager, Health, Safety and Environmental Audits, AlliedSignal, Inc. presented at the "Environmental Auditing: Making It Work For You" Conference 10/13-14/93 at the Sheraton University Center, Philadelphia, PA	10/13-14/93
VIII-A-30	09/30/94	Environmental Audits: Disclosure and Agency Response by Jacqueline A. Simmons, Ice Miller Donadio & Ryan 04/25-26/94	04/25-26/94

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VIII-A-31	09/30/94	Voluntary Environmental Audits - The Risks and Benefits by James R. Moore of Perkins Coie as presented to the American Bar Association's Section of Natural Resources, Energy and Environmental Law at the 22nd Annual Conference on Environmental Law, 03/11-14/93	03/11-14/93
VIII-A-32	09/30/94	Can You Trust Your Environmental Auditing Program? Organizational Issues In Establishing and Improving Environmental Auditing Programs by Alfred A. Marcus and Mark V. Nadel, Batelle Memorial Institute, Human Affairs Research Centers prepared for the Regulatory Reform Staff, Office of Policy and Resource Management, U.S. EPA	11/83
VIII-A-33	09/30/94	Enforcement: Definition of Corporate Compliance Called Major Strength of Draft Guidelines as taken from Current Developments, Environmental Reporter	11/26/93
VIII-A-34	09/30/94	Audit Requirement In Penalty Settlement Signals New EPA Theme article taken from Inside EPA	08/27/93
VIII-A-35	09/30/94	Environment Vise: Law, Compliance by Mariane Lavelle, National Law Journal	08/30/93

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VIII-A-36	09/30/94	Attorneys General Say EPA Should Show Greater Flexibility on Environmental Audits, Bureau of National Affairs, Environmental Reporter	03/25/94
VIII-A-37	09/30/94	Cal-EPA Heightens Consistency - a Bit by Deborah J. Schmall and R. Christopher Locke, Environmental Law Department, Landels, Ripley & Diamond	05/27/93
VIII-A-38	09/30/94	"EPA Rejects Colorado's new law," by John Brinkley. Article appeared in Rocky Mountain News, 7/28/94.	07/28/94
VIII-A-39	09/30/94	Environment Reporter, 08/21/92, "COMPANIES USE OF ENVIRONMENTAL AUDITS DEPENDS ON CONFIDENTIALITY, ATTORNEYS SAY."	08/21/92
VIII-A-40	09/30/94	Daily Environment Report, for 06-17-94	06/17/94
VIII-A-41	09/30/94	Inside EPA, 06-24-94, "EPA Asks States To Postpone Laws Protecting Corporate Self-Audits."	06/24/94
VIII-A-42	09/30/94	Environmental Air News, 12/14/92, "New Jersey Considers Voluntary Audit Program to Reduce a Company's Criminal Liability Exposure."	12/14/92
VIII-A-43	09/30/94	Environment Reporter, 01-07-94, "Discovery and Disclosure: How to Protect Your Environmental Audit Report," by M.H. Levin, A.D. Hymes and S. Mullaney	01/07/94

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VIII-A-44	09/30/94	The Environmental Forum, Jan-Feb, 1992, "Auditing and Criminal Enforcement"	Jan-Feb '92
VIII-A-45	09/30/94	The Harvard Environmental Law Review, volume 16,1992, number 2, "Environmental Audits and Enforcement Policy," by T.E. Hunt and T.A. Wilkins.	1992
VIII-A-46	09/30/94	American Criminal Law Review, volume 31, Fall 1993, number 1, "Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?," by R. Darnell.	Fall 1993
VIII-A-47	09/30/94	Environmental Auditing Roundtable, "Standards for Performance of Environmental Health, and Safety Audits", Feb. 1993	02/93
VIII-A-48	09/30/94	Special Committee on State/Regional Environmental Cooperation, 1993 Annual Report	1993
VIII-A-49	09/30/94	EPA Memorandum from T.C. Nash, to M. Walker. Subject: Minnesota "Environmental Partnership Agreement"	10/07/94
VIII-A-50	09/30/94	Federal Register, Friday, January, 15, 1993, part IV, Environmental Protection Agency, "Environmental Leadership Program; Proposed Establishment; Notice" Volume 58, number 10	01/15/93
VIII-A-51	09/30/94	Environmental Leadership Program: Update. Vol.59, No. 019, 59 FR 4066, Friday, January 28, 1994	01/28/94

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VIII-A-52	09/30/94	U.S. EPA, Office of the Administrator, Pollution Prevention Policy Staff. "Summary of Public Comments: Environmental Leadership Program Original Proposal, December, 1993"	12/93
VIII-A-53	09/30/94	Federal Register, Tuesday, June 21, 1994, Part IV, Environmental Protection Agency. "Environmental Leadership Program: Request for Pilot Proposals; Notice" Vol. 59, No. 118	06/21/94
VIII-A-54	09/30/94	Federal Government Initiatives in Environmental Auditing by L. Fleckenstein, Office of Policy, Planning & Evaluation, U.S. EPA as presented at the Annual Meeting of the American Institute of Chemical Engineers, 08/24-27/86, Boston, MA	08/24-27/86
VIII-A-55	01/05/95	Environmental Auditing: An Overview prepared by Arthur D. Little, Inc., Center for Environmental Assurance	1994

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VIII-A-56	01/05/95	Memorandum to S. Herman, A.A. for Enforcement and Compliance Assurance, U.S. EPA from C.J. Johnson, Division Vice President, Environmental Auditing, Browning Ferris Industries, Member, Compliance Management and Policy Group, Member, Board of Directors, Environmental Auditing Roundtable and R.F. Black, Director, Environmental Health & Safety Management Systems, B.F. Goodrich Company, President, Environmental Auditing Roundtable	10/14/94
VIII-A-57	02/10/95	Memorandum to C. Browner, Administrator, U.S. EPA from Rep. Thomas DeLay (R-TX), Rep. Thomas Bliley (R-VA), Rep. Jerry Lewis (R-CA), Rep. Mike Oxley (R-OH) and Rep. Bob Livingston (R-LA)	12/01/94
VIII-A-58	02/10/95	Memorandum to Rep. Thomas DeLay (R-TX) from C. Browner, Administrator, U.S. EPA	12/23/94
VIII-A-59	02/10/95	Memorandum to P.W. Schmidt, Director, Virginia Department of Environmental Quality from S. Herman, A.A. for Enforcement and Compliance Assurance, U.S. EPA	02/03/95

Docket # C-94-01	Date Received in Docket	Commentor, Addressee, Title or Description, etc. Basic Documents	Date of Document
VIII-A-60	03/30/95	*Federal Register* Notice, Monday, April 3, 1995, Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement ("EPA Self-Disclosure Incentive Policy	04/03/95
VIII-A-60(a)	03/31/95	1) Press release on EPA Self-Disclosure Incentive Policy; 2) Fact Sheet on EPA Self-Disclosure Incentive Policy; and 3) Q's and A's on EPA's Self Disclosure Policy	03/31/95
VIII-A-61	06/08/95	Memorandum from Steven Herman, Assistant Administrator, to Deputy Regional Administrators and Regional Counsel Regarding Effective Date of Voluntary Self-Policing and Self-Disclosure Interim Policy	04/17/95
VIII-A-62	06/08/95	(1) "A Dreadful Idea" Newspaper Article Editorial Regarding Arizona's 1290; (2) "DEQ Secrecy Plan Misguided" Newspaper Article Editorial in The Idaho Statesman	02/19/95 03/14/95
VIII-A-63	06/08/95	An Act - Minnesota Bill Chapter No. 168, H.F No. 147	

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VIII-A-64	07/5/95	Letter to Mr. Steve A. Herman, A. A. for Enforcement and Compliance Assurance, U.S. EPA from Peter W. Schmidt, Director, Department of Enviromental Quality	02/4/95
VIII-A-65	07/05/95	Letter to Mr. Peter W. Schmidt, Director of Enviromental Quality from Mr. Steven A. Herman, A. A. for Enforcement and Compliance Assurance, U.S. EPA	02/13/95
VIII-A-66	07/05/95	Letter to Honorable Tim Ford, Speaker of the House of Representatives from John H. Hankinson, JR., Regional IV Administrator, U.S. EPA	02/22/95
VIII-A-67	07/05/95	Letter to Ms. Trudy D. Fisher, Senior Attorney, State of Mississippi, Department of Environmental Quality Legal Division from John R. Barker, Regional IV Counsel, U.S. EPA	08/29/94
VIII-A-68	07/05/95	Letter to Honorable Roy Romer, Governor of Colorado from Jack W. McGraw, Acting Regional VIII Administrator, U.S. EPA	08/29/94

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VIII-A-69	07/05/95	Letter to Governor Roy Romer, State of Colorado, Executive Chambers from Steve A. Herman, A. A. for Enforcement and Compliance Assurance, U.S. EPA	10/17/95
VIII-A-70	06/27/95	Letter from Carol Browner, EPA Administrator, to the Honorable Lawton Chiles, Governor for the State of Florida, Regarding the new incentives policy, basic information, and some general thoughts on state privileges and immunity legislation	04/03/95
VIII-A-71	06/27/95	Letter froom John DeVillars, Regional Administrator, Region One, to the Honorable Lincoln Almon, Governor for the State of Rhode Island, Regarding EPA's Opposition to Rhode Island's Audit Privilege and Immunity Legislation Under Consideration (95-S 853, 95-H 6681)	05/12/95
VIII-A-72	06/27/95	Letter from John DeVillars, Regional Administrator, Region One, to the Honorable William Weld, Governor for the State of Massachusettes, Regarding their Proposed Priviledge and Immunities Legislation under Consideration (H-3593, H-3426)	

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VIII-A-73	06/27/95	Letter from Steve Herman , Assistant Administrator, to the Honorable Joel Hefley, U.S. House of Representatives, Regarding HR 1047 (Hefley Correspondence) Attached: 1) Letter from Joel Hefley To Steve Herman Regarding HR 1047 2) Letter from Steve Herman to Joel Hefley Regarding HR 1047	04/20/95 03/20/95 03/01/95
VIII-A-74	06/27/95	Testimony of Steven Herman, Assistant Administrator, Before Senator Hatfield, Regarding Small Business Compliance Programs and Incentives for Voluntary Self Policing and Disclosure (Hatfield Testimony)	
VIII-A-75	06/27/95	Letter from Steve Herman, Assistanct Administrator, to G.H. Holliday, President, Holliday Environmental Services Inc, Regarding Comments on EPA's Interim Policy (Gramm Letter)	UNDATED

Mr. GEKAS. We now turn to Ms. Schiffer.

STATEMENT OF LOIS SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Ms. SCHIFFER. Thank you, Mr. Chairman.

Mr. Rathbun, who is the U.S. attorney for the District of Kansas and is Chair of the Attorney General's Advisory Subcommittee on Environmental Crimes, is going to make the statement for the Justice Department.

STATEMENT OF RANDALL K. RATHBUN, U.S. ATTORNEY, DISTRICT OF KANSAS, DEPARTMENT OF JUSTICE

Mr. RATHBUN. Mr. Chairman, Congressman Reed, let me say first that I am very pleased and honored to travel back to Washington to give you the viewpoint of law enforcement concerning how this bill would affect our ability to enforce those laws that you write and ask us to enforce.

By way of background, I am the U.S. Attorney from Kansas. I am Chair of the Attorney General's Advisory Subcommittee on Environmental Crimes. That subcommittee has 14 U.S. Attorneys from across the country. We meet approximately semiannually to talk about issues that concern us in the enforcement of environmental laws.

The last time we met, we spent a lot of time talking about some of the bills that were being touted in terms of environmental audit privileges. We spent perhaps a half a day discussing that topic, and at the end we voted. We were unanimously and strenuously opposed to any sort of audit privilege. What I would like to do is tell you why we are.

When I hear the arguments made, those arguments at first blush make some sense. But, frankly, when you spend some time and look at this bill would change your mind. You ask me to enforce the criminal laws that apply to those that have criminal intent when they pollute. This bill sends me in to fight with those folks with my hands tied behind my back and a blindfold on, and I will tell you why.

It is very, very critical that we look at all the provisions of this bill because there is a privilege for evidence, there is a privilege for testimony, and there is an immunity provision. Today I would like to speak only to the effects on criminal law enforcement because, quite frankly, I am probably not qualified to talk about the effect on the civil part because I don't handle that. But I have had 13 years in working on environmental cases. I actually prosecute the environmental cases in Kansas, so I have a little bit of experience and I know what I am talking about on this.

Let me tell you that I have looked at this carefully and, under this bill, a criminal defendant can do catastrophic damage to the environment—can do harm to the environment, harm to people, and can simply walk away with no punishment—and I am going to explain to you in just a minute how they do that under this bill.

Under this bill, a defendant can hide facts; contrary to, perhaps, some of the testimony that you have heard today. Under the testi-

monial privilege that is in this bill, facts concerning criminal conduct can be hidden, which is a terrible, terrible thing.

Finally, under this bill our investigators—FBI agents, EPA-CID agents—when they go out to do a search warrant, they have to be very, very careful because of the broad-ranging immunity and privilege that is in these documents, because you will see this bill talks more than—talks to more than environmental audits. It talks to reviews. It talks to investigations. It literally can be a sheet of paper in a file that an FBI could come across in doing a search; not knowing that it was a privileged document under this bill. It is something that, frankly, scares me immensely.

Something that I like to do when I am trying to determine the effect on something that may be a little arcane is trying to apply that to a situation that is a little more down to earth. What I would like to do is tell you about a case that we see day in and day out, and that is bank fraud by a bank president, and apply this same bill to those facts. I am talking here not about the privilege part of the bill but about the immunity part of the bill. It is very important to make that distinction because there are three different parts of this bill.

Let me give you this hypothetical. A bank president walks into my office. He tells me that he has been systematically stealing from a bank. There has been an audit of the bank recently and he has promptly come into my office and disclosed that he is stealing from the bank. He also tells me, by the way, I am initiating a policy today to make certain that I don't steal again.

Now, he could also look at me and say, by the way, under this new bill, I have immunity and I don't intend to give you the money back.

Now, I could throw him out of my office and I probably would, but I couldn't prosecute him under this bill. And that is because under the immunity provisions of this bill there are very, very strict limitations as to when immunity doesn't apply; and if an individual can show that this disclosure arises out of a self-evaluation and that it is promptly disclosed under section 6 and that steps had been taken to address the problem, that is that. He has immunity and there is not a darn thing I can do about it.

But let's don't talk about hypotheticals in another area. Let's talk about what it would do to me in trying to prosecute these environmental cases that you ask me to prosecute.

Let me give you an example. Let's say the president of a company starts watching how his bills for disposal of hazardous waste go down each month and they get less and less and he gets concerned and wonders what is going on. He tells his foreperson to go out and do an investigation. His foreperson goes out into the lot behind the plant and sees a rogue employee dumping carcinogenic material into the river.

If they come to me and say, there has been a prompt disclosure here, the problem is, under the testimonial privilege provisions of this bill, I can't even prosecute the rogue employee. There is nothing I can do in that situation.

This bill has so many flaws that I haven't had a chance to actually get to the theory on environmental audits and why, frankly, we think that legislation to encourage them really isn't needed. To

me, it comes simply down to this: Each year more and more companies do environmental audits. Each year we hear complaints, but more and more companies do environmental audits because they make sense in the long run. To the extent a misperception exists out there and to the extent the word hasn't got out—that companies that perform an audit, and disclose and correct the violations that are discovered, will be more, not less, favorably treated—we need to do a better job, and I need to do a better job, and I have tried to do that job in my district. In fact, let me give you an example. I had a case where a small company in Wichita was doing some groundwater remediation and, frankly, they made a mistake and discharged some some water containing hazardous waste. They had a very, very good training record. It was an employee that made a mistake and simply didn't mean to do it.

The laws that have been written probably would indicate that I could have prosecuted there, but we have a good policy in the Department of Justice, that has been there since 1991, that says, to the extent there is self-disclosure and self-correction, we shouldn't prosecute those cases and, of course, we didn't prosecute that case; and I thanked him for his honesty, and we sent him on down the road because they took care of that problem.

The problem is, I don't think people understand that that is the Justice Department policy. I think people do not understand that we have been unable to find one case of abuse. I went through WestLaw, the Department has reviewed our files; we have been unable to find one single case in which an audit has triggered a Federal investigation. There is nothing in the reported cases. There is not one single case that we can find out that an audit has actually triggered a Federal investigation.

This policy in the Department is very, very important. I think the U.S. attorneys try to follow it. I think we perceive, just as you do, that there is a feeling out there that we must work as hard as we can to educate and to work with the folks out there that pay the taxes and try to comply with the law.

Frankly, this bill is a bad idea. It is an idea which ties my hands in order to solve a problem that doesn't exist.

Could I ask that my written testimony be made a part of the record?

Mr. GEKAS. Without objection, it is so ordered.

Mr. RATHBUN. Thank you.

[The prepared statement of Mr. Rathbun follows:]

PREPARED STATEMENT OF RANDALL RATHBUN, U.S. ATTORNEY, DISTRICT OF KANSAS, DEPARTMENT OF JUSTICE

I. INTRODUCTION

Mr. Chairman and members of the Subcommittee: I am Randy Rathbun, the United States Attorney for the District of Kansas and the Chairman of the Attorney General's Advisory Committee on Environmental Crimes. With me today is Lois Schiffer, Assistant Attorney General for the Environment and Natural Resources Division of the Justice Department. We are pleased to have this opportunity to present the views of the Attorney General on two issues crucial to law enforcement and to the ability of the public to protect itself from environmental threats: (1) whether Congress should immunize illegal conduct from criminal or civil enforcement and (2) whether Congress should authorize polluters to conceal violations from law enforcement officials and from the public. My testimony today will explain why the Attorney General opposes legislation, such as H.R. 1047, that would establish a privilege

for environmental self-evaluations and would grant immunity to environmental violators for self-disclosed violations.

Let me first explain the roles of both the Environment and Natural Resources Division and the United States Attorney's Offices in environmental enforcement. The Environment Division works closely with the United States Attorney's Offices, with the Environmental Protection Agency (EPA), and with several other agencies, including the U.S. Army Corps of Engineers and the Coast Guard, to bring criminal and civil enforcement environmental statutes. The Environment Division and the U.S. Attorneys Offices work together to bring several hundred civil enforcement actions each year in which we seek to correct the violations, prevent harm to the environment, recover any economic benefit of noncompliance, and deter future violations. We bring a smaller number of criminal cases each year in which the conduct of the violator is so egregious as to warrant criminal prosecution. Of course, the bulk of environmental enforcement is done by state and local law enforcement officials across the nation.

A common misconception is that the Department frequently bases a large number of enforcement actions on environmental audits. In fact, as I will discuss in more detail later, audits are never used to trigger enforcement actions and are rarely used as evidence in such actions, but can be very important evidence in those cases in which it is used. The backbone of environmental protection is voluntary compliance, but for those violators who do not voluntarily comply, a vigorous enforcement program is necessary to remedy violations, punish criminal conduct, and to deter violations. A strong enforcement program also serves to protect those companies who comply voluntarily from being competitively disadvantaged by those who do not.

There should be no doubt that the Department fully supports the use of self-auditing as a means to obtain compliance with environmental laws. The business community also supports self-auditing, which is already utilized by the vast majority of medium and large companies. The Department agrees that self-auditing, self-policing and voluntary disclosure of environmental violations can play a crucial role in promoting environmentally sound business practices. That is why, since July, 1991, it has been the express policy of the Department that these activities are important mitigating factors in the exercise of criminal prosecutorial discretion. Under the Department's policy, positive steps by regulated entities to disclose their violations and to bring themselves into compliance with environmental laws are considered at the point when the decision is made whether to bring an enforcement action, and, if so, the type of action to bring.[1]

In addition to continuing to follow its 1991 policy, the Department has committed to the following: We will not seek information concerning environmental auditing from a regulated entity prior to receipt of other information suggesting that the entity has committed violations of environmental law. We will also view the use of effective programs to prevent and detect violations of law, as well as self-reporting, cooperation and acceptance of responsibility, as mitigating factors in the sentencing phase of environmental criminal cases against corporations.

EPA's recently announced Environmental Self-Policing and Self-Disclosure Interim Policy, in conjunction with the Department's policies and our shared commitment to an aggressive enforcement program, will encourage environmental compliance auditing, voluntary disclosure, and greater compliance with the environmental laws. The Department is committed to working with EPA to ensure that federal enforcement policies and practices further our common goal of encouraging self-monitoring, self-disclosure, and self-correction of environmental violations.

The Department strongly opposes H.R. 1047, which would create evidentiary, discovery, and testimonial privileges for "voluntary environmental self-evaluations," and which would provide immunity from fines and penalties for violations that are the subject of a "voluntary disclosure" to a federal or state official, subject to specified exceptions. H.R. 1047 is hopelessly flawed. It would shield illegal, including criminal, misconduct; interfere with law enforcement; conceal information vital to public health and safety from the public and from enforcement authorities; result in costly litigation and squander limited enforcement resources; create an atmosphere of distrust between regulators and regulated entities; and conflict with public policies of openness and corporate accountability.

Our principal objection to the bill is that it would impair enforcement. By allowing violators to shield environmental problems from the public, by granting immunity for environmental misconduct, and by tying up environmental enforcement in end-

[1] U.S. Department of Justice, "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (July 1, 1991).

less litigation, this bill punishes the law-abiding environmentally sound company and rewards those who flout the law. Voluntary compliance, as the findings in the bill recognize, is the cornerstone of ensuring protection of human health and the environment. By weakening enforcement, this bill would undermine one of the major incentives for regulated entities to comply voluntarily with laws that protect human health and the environment. Furthermore, there is no reason to believe that there would be compensating benefits sufficient to offset the adverse effects of this legislation. Therefore, we strongly oppose its enactment.

II. IMMUNITY FOR SELF-DISCLOSED VIOLATIONS WOULD DIRECTLY INTERFERE WITH FAIR AND EFFECTIVE ENFORCEMENT OF THE LAW

The Department opposes enactment of both the environmental audit privilege and immunity provisions of H.R. 1047. The immunity provisions appear to allow violators, including those engaged in criminal violations of environmental statutes, to go free. It is unconscionable to create a statutory immunity for violations of federal statutes designed to protect the health and safety of the American public irrespective of whether those violations may have endangered the public, damaged the environment, or resulted in long-term environmental harm.

Providing immunity for violations voluntarily disclosed to the government would frustrate legitimate enforcement efforts and would discourage regulated entities from taking sufficient precautions to avoid violations in the first instance. Environmental laws, like other laws designed to protect public health and safety, were created to regulate those activities that ". . . touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."[2] Since the public is completely powerless to protect itself from unknown environmental violations, the law forces individuals and corporations who are responsible to remedy the situation or face the possibility of a civil action or a criminal prosecution. The law sends a powerful message that those who are in a position to prevent or to remedy a violation, must do so.

An immunity provision sends a different message: there is no need to take a proactive approach to environmental management because a company can immunize itself from civil and criminal penalties even after it has caused serious environmental problems, by conducting a self-evaluation, disclosing, and only then initiating action to correct those problems. The notion that a company can escape prosecution even for criminal conduct merely by confessing and belatedly taking action to correct its wrongdoing is unparalleled in any other enforcement scheme of which the Department is aware. Why not allow other criminals similar protection if they confess and agree to mend their ways? The illegal conduct of environmental polluters costs society billions of dollars, causes damage to our nation's natural resources and has caused serious injury and death. It is no less deserving of criminal punishment than many other types of criminal conduct.

For example, the Department of Justice recently brought a criminal enforcement action against a Florida company and two individuals for illegally disposal of toluene, a solvent, in the company dumpster.[3] Two 9-year-old boys, from the adjacent residential area, who were playing in the area, climbed inside, were overcome by the fumes, and died. On June 12, just a couple of weeks ago and not far from this hearing room, the U.S. Attorney for the District of Columbia announced the guilty pleas of the two individual employees responsible for illegally disposing of the same deadly solvent in a dumpster, this time near the Bruce Place housing project in Southeast Washington.[4] These are not speculative dangers. Yet, if the Florida company or the individuals had learned of the boys' death before the government, and had confessed and promised to clean up the dumpster, they may have been eligible for amnesty from criminal prosecution pursuant to H.R. 1047. Given this potential outcome, an immunity provision is completely antithetical to law enforcement and the rule of law.

Ostensibly, this bill gives such immunity for "voluntary disclosures," but because it fails to contain an exemption for legally required disclosures, in fact, it would give immunize from penalties those responsible for oil spills, releases of hazardous substances, and other environmental hazards where reporting of the violation is mandated by law. Such immunity can only result in severe damage to the health and safety of the public and to the environment.

It does not even appear to be a prerequisite to obtaining immunity that the violator remedy any environmental harm resulting from the underlying violation. Thus,

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[2] *United States* v. *Dotterweich*, 320 U.S. 277, 280 (1943).
[3] *United States* v. *William Recht Co.*, 94–70CRT–17B (M.D. Fla.).
[4] *United States* v. *Mary Ellen Bauman and Patrick "Pookie" Hill* (D.D.C.).

if through negligence, recklessness, or perhaps even intentional conduct, a company were to allow an oil pipeline to leak for years and contaminate the drinking water, the company need only inform the authorities and agree to repair the pipe to escape all sanction. Because initiating steps toward future compliance appears to be all that is required, it would not even be required to clean up the ground water. Immunizing such conduct will discourage companies from maintaining a high standard of care.

The penalty immunity provisions of H.R. 1047 disadvantage the law abiding company as well. A company that makes the expenditures necessary to treat its wastewater should not be at a competitive disadvantage to one that ignores the law for years and decides to confess and obey the law only when the resulting water pollution is unmistakable. We all know that if we break the law, we have to pay the price. Corporations should do the same.

Consider a situation where the manager of a facility for a large corporation decides to forego improvements necessary to meet environmental requirements, so as to save expenses and increase profits. Suppose the company saves a million dollars, and in so doing gains an advantage over its competitors, and increases its market share. Two years later the company's management does an audit, discovers the violation, corrects the violations, and discloses it to the government. If this bill were enacted, the company would not to have to pay any penalty, would retain the million dollar economic benefit from its violation, and would keep the competitive advantage it gained from its violations. It is precisely because of this type of scenario that many responsible corporations support the disgorgement of illegally obtained profits from violators.

Perhaps the most disturbing aspect of the bill is its prohibition on the issuance of a cease and desist order by a federal or state agency if that agency failed to show that a violation was not voluntarily disclosed. Irrespective of the circumstances under which a regulatory agency learns of a violation, it must retain the authority to order immediate action to prevent further harm. The bill would directly interfere with EPA's and the state's ability to protect the public from environmental catastrophes, such as drinking water contamination or oil spills.

III. AN ENVIRONMENTAL AUDIT PRIVILEGE WOULD IMPAIR LAW ENFORCEMENT, RESULT IN ABUSE, CONCEAL INFORMATION VITAL TO PUBLIC HEALTH AND SAFETY, INCREASE LITIGATION, AND INTERFERE WITH THE TRUTH-SEEKING PROCESS

The provisions of H.R. 1047 that create evidentiary and discovery privileges are as flawed as those providing for immunity. An evidentiary privilege for environmental audits would be a radical and unjustifiable departure from current law. An audit privilege would have no certain benefits, but would disrupt law enforcement and the ability of the public to protect itself from environmental harms. Legislative creation of such a privilege is not only unnecessary, but unwise, and we strongly oppose any such legislation.

An Environmental Audit Privilege Would Impair Enforcement

The public is entitled to some assurance that environmental lawbreakers will receive swift and sure punishment for their illegal conduct. Unlike the speculative claims of proponents of privilege, prosecutors know from experience the effect of privileges generally on enforcement. Privileges make enforcement of the law more difficult. A privilege interferes with the ability of enforcers to obtain evidence relevant to enforcement actions and to their ability to determine the truth.

In criminal enforcement actions involving search warrants, there can be substantial litigation over whether privileged documents were seized and the scope of the privilege. These arguments tie up valuable prosecutorial resources and can result in the dismissal of prosecutions if the prosecution's case is found to have been tainted by some privileged document or the mere passage of the time necessary to litigate the privilege issue results the loss of evidence necessary to prove guilt. A privilege can also result in litigation to determine whether each piece of evidence that the prosecution intends to introduce was derived from a source independent of the privileged evidence or whether it is instead "fruit of the poisonous tree." This process results in the loss of time, of money, and of evidence valuable to the truth-seeking process.

The privilege propounded by this bill, however, is far broader than any existing privilege. For example, it appears to confer a privilege upon all communications associated with an environmental self-evaluation, including facts and data, as well as conclusions and opinions. In a balancing of secrecy versus the public interest in the disclosure of environmental violations, it cannot be justified as a matter of sound public policy.

Because the privilege is not restricted in its application to detailed, comprehensive audit reports prepared by outside consultants, it appears that the legislation might prohibit the use at trial of internal memoranda prepared by managers to their supervisors addressing known, ongoing environmental problems. Indeed, the legislation might even prohibit the use of ordinary oral statements made by one employee to another concerning environmental problems.

For example, where an electroplater was consistently discharging untreated effluent into city sewers, warnings by the manager of the waste water treatment plant to the plant manager that the plant was operating in serious violation of its industrial discharge permit might be inadmissible, if the company and plant manager were able to show, in an *in camera* hearing, that the company had investigated the matter and decided that, rather than install proper pretreatment equipment, they would develop a plan to phase out the particular electroplating process over a one-year period. The company and plant manager could argue that they had "initiated efforts to achieve compliance," that it was too costly, and therefore not "reasonable" for the plant to install appropriate equipment immediately, and that their plan was "adequate to achieve compliance."

Within the one-year period, an illegal discharge by the electroplater could disrupt the operation of the city's publicly owned treatment works and require costly repairs at taxpayer expense. Yet the evidentiary privilege could make it impossible for the government (including the city) to show that the plant manager knew at the time that the facility continued to be seriously out of compliance. None of the statements of the waste water treatment manager to the plant manager, warning him that the facility was out of compliance, would be admissible.

A New Evidentiary Privilege Could Result in Abuse

An audit privilege would be susceptible to abuse by unscrupulous entities. While the most regulated entities voluntarily comply with the environmental laws, there are some who would take advantage of an evidentiary privilege to shield all kinds of evidence of wrongdoing from authorities. Many of the defendants in environmental criminal enforcement actions have defrauded or lied to the government as well as violated the environmental laws. People who would lie about other aspects of their business or environmental practices could be expected to falsely label documents as "environmental self-evaluations" as well to claim a privilege. Even if law enforcement authorities were eventually able to obtain the use of such a document, it would only do so after much wasted time and expense.

A Privilege Statute Would Conceal From Government Officials and the Public Information Directly Affecting Public Health and Welfare

An evidentiary privilege would create a legal right to conceal from the public and from public officials information regarding potential risks to public health and the environment. The public has a right to know of environmental hazards that may threaten them and their families.

Environmental regulation relies on public and governmental scrutiny of information relating to the handling of environmental contaminants. Citizens and government agencies use such information to make reasoned judgments regarding steps to protect public health and safety and to fashion appropriate responses to violations.

Federal environmental statutes generally rely upon one or more systems of record keeping and reporting of compliance data by those subject to the regulatory scheme.[5] In fact, these systems serve as the principal means for ensuring adherence to the law. Because the government cannot be everywhere at once overseeing activities that may affect the environment, the extensive system of required self-reporting is vital to a coordinated and effective enforcement effort. It is equally important that the environmental information reported to governmental agencies be both accurate and complete. Therefore, government officials must have access to information to aid them in prosecuting knowing falsifications of such data and otherwise in ensuring its reliability. Testimony and documents prepared by whistle blowers and outside consultants, such as environmental auditors, are often important to determining the reliability of company records. Such information will often be unavailable pursuant to the evidentiary and testimonial privileges in H.R. 1047.

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[5] Two examples are (1) the monthly discharge monitoring reports (DMRs) required under the Clean Water Act to be filed with governmental agencies by all holders of permits to discharge to waters of the United States and (2) the requirements under the Federal Insecticide, Fungicide, and Rodenticide Act for producers of registered pesticides to notify EPA immediately of any previously unreported adverse effect observed from ongoing use of the product.

Environmental statutes are also premised on the notion that the American people have the right to know about and to protect themselves and their families from environmental hazards. There is a specific statute designed to inform the public of potential pollution risks, Title III of CERCLA, the Emergency Planning and Community Right-to-Know Act. 42 U.S.C. 11001–11050. In addition, the environmental statutes give citizens an opportunity to comment with respect to a variety of regulatory decisions, *e.g.*, permitting decisions, administrative enforcement actions, environmental impact statements, draft regulations. In most circumstances, they also have the right to challenge such actions in court so as to protect their interest in a safe and healthy environment. Most major environmental statutes also have citizen suit provisions, which authorize citizens to bring enforcement actions to stop ongoing violations when the government has failed to do so.

Statutory authorization for companies to conceal violations is hardly likely to improve environmental performance. Our experience with statutes such as the Emergency Planning and Community-Right-to-Know Act suggests that companies voluntarily reduce the amount of pollution they generate when their actions are subject to public scrutiny.

It is against this backdrop that a privilege for environmental self-evaluations, such as that in H.R. 1047, must be considered. In a system designed to maximize the information available to the public to decide where to work, where to live, and where to recreate, a privilege for environmental self-evaluations would be unwise. Openness and accountability have always been and continue to be foundational in environmental law, and they are values from which we should not retreat.

Imagine the public outcry if the government were prevented from obtaining audit information about a violation leading to death or serious bodily injury. Indeed, in the wake of the Exxon *Valdez* disaster, Congress amended the immunity provision contained in the oil reporting requirements of the Clean Water Act to ensure that the government would not be prevented from utilizing an oil spill notification against a corporation or responsible parties other than the natural person actually providing the notice. Corporate secrecy does not serve any environmental goal.

A New Evidentiary Privilege Could Result in Wasteful Litigation

This bill would invite whole new layers of pre-trial litigation that would present an obstacle to enforcement. For example, the environmental auditing field is new and there are no national standards, no certification requirements for auditors, and no consistent definitions. This provides an incentive for would-be violators to claim that normal day-to-day business practices constitute "audits" or "self-evaluations" and to include all sorts of data in such a report to avoid enforcement. This is a particularly grave concern given the broad definition of "environmental self-evaluation" in H.R. 1047. The bill creates a privilege for "voluntary environmental self-evaluations," which does not appear to be limited to a legitimate and objective environmental audits performed by a professional, but instead could be interpreted to include even the most casual survey of a facility for environmental problems.

Litigation over whether the privilege was properly invoked would provide violators with numerous opportunities to delay enforcement, to force the government and the courts to expend their limited resources on needless litigation, and to frustrate legitimate efforts to pursue violators of the law. This bill would also impair environmental enforcement by tying up such actions in disputes over its vaguely defined terms, such as the meaning of "voluntary environmental self-evaluation" and "voluntary disclosure," which turn on such subjective factors as whether the violator initiated efforts to achieve compliance with the law "within a time period that is reasonable and is adequate to achieve compliance." These determinations would be made in a series of closed *in camera* hearings that would vastly increase the litigation costs to be borne by the U.S. taxpayer. Because the privilege would presumptively apply even to those who did not disclose or correct the violation, the cost of prosecuting such bad actors would increase greatly.

If a document was ultimately determined to be privileged, law enforcers could expect motions to exclude other evidence as "fruit of the poisonous tree" as well as motions to exclude prosecutors who may have become "tainted" by their exposure to privilege evidence. It appears that the privilege would apply to bar the use of evidence even against rogue employees who were engaged in criminal conduct against company policy. Environmental enforcement under this bill would be seriously hampered, and voluntary compliance could be expected to deteriorate proportionally.

An Environmental Audit Privilege Would Interfere with the Truth-Seeking Process

Evidentiary privileges are quite limited in our legal system, and with good reason. Privileges interfere with the truth-seeking process by limiting access to relevant and often very persuasive evidence. As the Supreme Court has stated:

> [P]rivileges contravene the well-established principle that "'the public . . . has a right to every man's evidence'" and, therefore, must be strictly construed Andy "'accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" [*Trammel* v. *United States*, 445 U.S. 40, 45 (1980).]

Moreover, the audit privilege would create a special evidentiary privilege for corporations, something that the Supreme Court consistently has been unwilling to do. Unlike individuals, corporations enjoy no general privilege under the Fifth Amendment against self-incrimination. Thus, ordinarily corporations cannot, and should not be able to, withhold incriminating documents that are responsive to government subpoenas.[6]

Environmental law is not the only legal arena involving complex regulations. For example, tax, securities and governmental contracts involve equally complex regulations, and often self-reporting as well, but there is no evidentiary privilege for audits or internal reviews performed in connection with these subjects. Indeed, since environmental statutes are designed to protect the public health and safety, there are especially strong reasons to avoid creating a mechanism for shielding information about potential environmental violations.

Proponents of an environmental audit privilege cite the so called "self-evaluative" privilege as support for their position. The self-evaluative privilege is a qualified privilege recognized by some lower federal courts (and rejected by others) that protects from discovery certain critical self-appraisals, but not factual information underlying those self-appraisals.[7]

The self-evaluative privilege has never been applied where the information in question is sought by a government agency for law enforcement purposes.

> Whatever may be the status of the "self-evaluative" privilege in the context of private litigation, courts with apparent uniformity have refused its application where, as here, the documents in question have been sought by a governmental agency. As a general matter, this conclusion makes sense in the light of the roots of the privilege in the public interest, and the strong public interest in having administrative investigations proceed expeditiously and without impediment . . . .

In re Grand Jury Proceedings, 861 F. Supp. 386, 388 (D. Md. 1994). Even in private party litigation, courts have generally declined to recognize a self-evaluative privilege in the environmental area because of the "public need for disclosure of documents relating to environmental pollution and the circumstances of such pollution. . . ."[8]

IV. THERE IS NO VALID JUSTIFICATION FOR AN ENVIRONMENTAL AUDIT PRIVILEGE

Corporations, and the lawyers who represent them, claim that a new federal evidentiary privilege, and a provision providing violators with immunity, are needed to encourage the use of audits. However, their argument fails to take into account the facts, the law, public policy as reflected in the laws enacted by Congress, or the adverse impact on the environment and law enforcement that would flow from the enactment of privilege and immunity legislation.

There has not been any abusive use of audit information by civil or criminal prosecutors

Proponents of an environmental audit privilege have tried, but failed, to show a need for an evidentiary privilege based on prosecutorial abuse. There has not been any abusive use of audit information by prosecutors. In fact, neither the Department of Justice nor EPA has been able to find a single case at the federal or state level in which there was a criminal prosecution for a violation discovered as a result of a self-audit and voluntarily disclosed to the government. Furthermore, in the more than 600 environmental criminal cases prosecuted by the federal government since

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[6] *See, e.g., Braswell* v. *United States*, 487 U.S. 99 (1988); *Bellis* v. *United States*, 417 U.S. 85 (1974); *In re Grand Jury Proceedings*, 861 F. Supp. 386, 389–90 (D. Md. 1994).

[7] *See. e.g., Reichhold Chemicals, Inc.* v. *Textron Inc.*, 157 F.R.D. 522, 524 (N.D. Fla. 1994).

[8] *Koppers Co.* v. *Aetna Casualty and Surety Co.*, 847 F. Supp. 360 (W.D. Pa. 1994).

1982, only a handful involved the use of an actual environmental audit report.[9] In those cases, the audit was obtained after an investigation was well underway based on other evidence, and they were used to provide direct evidence that someone knew of ongoing violations (and sometimes also of the environmental harm likely to result from those violations) and chose not to correct them. These cases do not reflect abusive enforcement practices by the government, but instead reflect the proper use of evidence of criminal conduct by company officials. A privilege would provide a legal basis for hiding an ongoing crime.

There has been no misuse of environmental audits in civil enforcement either. Neither the Department nor EPA requests audit reports from a regulated entity before having an independent basis for believing that a violation had occurred. In other words, we do not engage in fishing operations by asking companies for their audit reports to look for violations. We request an audit report only when we have already identified violations from inspection reports, monitoring reports, or some other source, and then only when they are material to a disputed issue in the litigation, such as the scope of violations, the source of the violations, or the extent of environmental harm.

Some proponents of privilege concede that the problem is one of perception, not reality. The answer to that misperception is to create positive new enforcement policies and publicly to correct misperceptions, as EPA has done, not to pass legislation that will impair legitimate law enforcement.

Environmental Auditing is Encouraged, Not Deterred, by Strong Enforcement

Proponents of a privilege also argue that the threat of enforcement has chilled environmental audit efforts by the regulated community. To the contrary, available data shows that more companies are performing audits all the time, and that companies that have been auditing are continuing to expand and improve those programs.[10] The most recent survey of trends in corporate environmental auditing, Price Waterhouse's *Voluntary Environmental Audit Survey of U.S. Business* (March 1995), found that 75% of the companies surveyed have existing auditing programs, and that ⅓ of those companies without existing auditing programs plan to begin auditing.

One of the principal reasons for the increase in auditing is the strength of DOJ's and EPA's current environmental enforcement program.[11] Companies perform audits and correct violations found in those audits because they know that if they do not, they will be subject to criminal sanctions, civil penalties, the cost of remediating environmental harm, tort liability, and litigation costs. The recent Price Waterhouse survey of environmental auditing practices of U.S. companies verified that strong enforcement has the effect of increasing compliance levels and inspiring more companies to undertake audits in order to discover and correct violations. Specifically, 96% of respondents indicated that one of the reasons why they perform environmental audits is to identify and correct problems before they are discovered by an agency inspection.

Thus, the strongest incentive to perform compliance audits and correct violations is a strong enforcement program. Environmental statutes create self-reporting programs that assume companies will act in good faith to comply. Such programs are effective only if there is effective enforcement. Enforcement not only deters violations, but ensures parity in business by removing the competitive advantage gained by those who fail to comply with the law. A disincentive to audit simply does not exist, but passage of H.R. 1047 is almost certain to impede the current enforcement program, thus eliminating a current incentive to audit.

Contrary to the claims of proponents, a new evidentiary privilege would increase the involvement of lawyers

The notion that creating an audit privilege takes lawyers out of the auditing process is mistaken. Most companies that perform audits would still need lawyers to en-

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[9] These involved the use of documents that generally would meet EPA's definition of "environmental auditing," which is "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." 60 Fed. Reg. 16875, 16876 (April 3, 1995). In contrast, daily factory inspections and other such routine business practices appear to be potentially privileged "environmental self-evaluations" pursuant to H.R. 1047.

[10] *See, Note, Environmental Criminal Enforcement and Corporate Environmental Auditing: Time For a Compromise?*, 31 American Criminal Law Review 123 (1993), citing a 1992 Arthur D. Little, Inc. survey of Fortune 100 companies in which eighty percent of respondents stated that they plan to expand their corporate environmental auditing programs.

[11] The Arthur D. Little, Inc. study referenced in footnote 10 also found that among the primary reasons for the expansion of audits is the existence of significant penalties for noncompliance.

sure that the audit fell within the bounds of the audit privilege statute and for assistance in identifying and interpreting the statutes and regulations applicable to their operations. In addition, audit privilege bills, including H.R. 1047, contain numerous terms that will be the subject of extensive litigation. By introducing uncertainty into the law, the bill is likely to increase the need for legal advice.

A Privilege Is Unlikely to Generate More Environmental Audits or Improve Environmental Compliance

Despite the claims of its proponents, there is little or no reason to believe that an environmental audit privilege would increase the amount or the quality of environmental auditing. Among those companies responding to the Price Waterhouse survey, the most important reason given by those companies that do not currently audit for their failure to do so was a belief that their products and processes have insignificant environmental impacts. A concern that audit information could be used against them for any purpose was identified by slightly fewer than one in five respondents. For those companies unwilling to expand an existing auditing program, limited company resources was the principal reason identified, not fear of enforcement. Although many respondents expressed an interest in obtaining a federal audit privilege—49% of respondents—almost the same number expressed an interest in having EPA adopt a presumption against company criminal prosecution if a comprehensive audit program is in place, corrections are made, and violations are reported—45% of respondents. EPA's interim policy contains precisely such a presumption. Thus, a federal environmental audit privilege would not be likely to be any more effective in encouraging audits than the policy that EPA has already announced.

Proponents of an audit privilege also argue that better auditing will result from the creation of an evidentiary privilege for audits. There is no empirical support for this assertion, but in any case, better auditing is not the principal goal. Better environmental protection is the goal. Detailed, thorough audit reports that sit on the shelf benefit no one. The existence of an audit privilege will diminish the current incentive to promptly correct violations as well as to identify them before enforcement authorities do so. With the privilege as an obstacle to enforcement, companies may believe they will be able to conceal from both the regulators and the public the fact of violations and the environmental harm resulting from the violations.

In addition, public and governmental scrutiny of corporate behavior generally increases the level of responsible behavior, not the reverse. Companies whose environmental record will be scrutinized by enforcement authorities and the public are far more likely to improve their environmental compliance than those whose actions are covered by a shroud of secrecy.

V. STATE AND LOCAL OPPOSITION TO AUDIT PRIVILEGE/IMMUNITY BILLS

Because audit privilege and immunity bills would block legitimate law enforcement and would interfere with the public's access to information about threats to their health and safety, numerous state and local officials across the country have opposed these bills. The National District Attorneys Association, the California District Attorneys Association, the New York District Attorneys Association, Attorneys General from at least fourteen states, and many state and local agencies and environmental officials have opposed these bills. For example, the California Attorney General's office has opposed an environmental audit privilege because it would "hide the truth [from the] people of [the] state."[12] Fourteen Attorneys General have opposed an environmental audit privilege on the ground that it "could undercut efforts to cooperate with the good actors while providing a new barrier to prosecuting bad actors.[13] The National District Attorneys Association has "strongly opposed" adoption of an environmental audit privilege, which "risks affecting the activities of every law enforcement agency in this country."[14] In addition to law enforcement and other governmental entities, scores of citizen's groups across the country have banded together to oppose these bills, including public health groups, religious groups, environmental groups, and unions. On the other hand, the industry lobbyists and their attorneys who support the bill do not purport to represent the interests of most Americans.

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[12] Letter from Edwin F. Lowry, Deputy Attorney General, to Carol Browner (May 4, 1995).

[13] Comments on Environmental Auditing Policy, prepared for the July 27, 1994, U.S. Environmental Protection Agency Public Meeting, submitted on behalf of Attorney Generals of Alabama, Arizona, Connecticut, Delaware, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, and New York.

[14] Letter from Robert L. Deschampe to Janet Reno, February 23, 1995.

VI. CONCLUSION

Thus, the Department vigorously opposes any bill that would create a privilege for audit-related materials or an enforcement immunity for those who disclose environmental violations to the government. The damage to environmental protection from passage of such a bill, and the real risk to the Department's ability to enforce the nation's laws, far outweigh any speculative gains these proposals might accomplish.

Mr. GEKAS. Well, we thank the gentleman and we will now turn to Mr. Kelso.

STATEMENT OF HARRY H. KELSO, DIRECTOR OF ENFORCEMENT AND POLICY, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Mr. KELSO. Thank you, Mr. Chairman. My name is Harry Kelso. I serve as the director of enforcement and policy at the Virginia Department of Environmental Quality, the agency of the Commonwealth of Virginia that is charged with enforcement, permitting and regulation.

I ask that my written comments be included in the record.

Mr. GEKAS. Without objection, so ordered.

Mr. KELSO. As background, the issue of environmental audits and any protections afforded therefrom have been the subject of debate within the Federal Government since EPA issued its audit policy in 1986, in which it sought to achieve an appropriate balance between its desire to detect violations and its concurrent desire to encourage industry to conduct audits, uncover environmental problems, and to correct them. Demonstrating the Federal Government's skepticism about any audit privilege, a number of letters have been sent by the Federal Government, usually from different officials at EPA, to officials in various States that were contemplating environmental audit privilege legislation.

The Federal response is uniform in their fairly strident tone against the audit privilege legislation, ranging from threatened increased Federal enforcement in delegated programs to pledges to cut off delegated grant mandates. The Commonwealth of Virginia was a recipient of one of those warning shots that came earlier this year. In the midst of this year's debate in the Virginia General Assembly over this issue, the director of the Virginia Department of Environmental Quality, Peter Schmidt, received such a letter. After receiving the letter, the General Assembly of Virginia passed a State audit privilege piece of legislation and Gov. George Allen signed it.

Only weeks later, President Clinton announced a new, more cooperative policy with regard to environmental audits, one of more cooperation and incentives for good behavior, rather than necessarily relying solely on the command and control approach. The new policy includes such incentives as a 180-day enforcement grace period for small businesses and an effort to seek reduced penalties to companies who voluntary disclose and correct violations. That was encapsulated in the draft EPA policy that Mr. Herman referred to earlier.

We believe that without statutory relief given audit privilege, the private sector cannot be expected to take the bold risk of discovering and divulging their own environmental problems.

Historically, the metamorphosis of the debate over environmental audit privileges begins with the well-settled legal proposition that privileges and immunities have to be strictly construed. Recognizing this policy of narrow privilege construction, there is considerable precedent in U.S. jurisprudence for the creation of limited privileges and limited immunities; most, if not all, such privileges and immunities are very limited in scope and they are constructed to achieve three goals.

First, the goal of maintaining the confidentiality and sanctity of certain relationships such as the marital privilege, the attorney-client privilege, and the doctor-patient privilege.

The second reason is the privileges are constructed in order to encourage the frank discussion of difficult problems without the fear of outside publication or activity. It should be noted that even the Federal Government enjoys a limited privilege. It is called the "deliberative process" privilege, and it is contained in the exceptions to the Freedom of Information Act.

The third reason, and most relevant to our topic, the creation of a limited privilege for audits and limited immunity is to seek another goal, which is to encourage compliance.

So there is a clear trail of the creation of limited privileges and limited immunities in U.S. jurisprudence. And it is in that narrowly constructed context, as well as following a number of other States, that the Commonwealth of Virginia enacted its own environmental assessment legislation earlier this year. It provides incentives for voluntary disclosure and proactive environmental corrections based on the view that if an entity takes the initiative to determine its environmental compliance problems, cleans them up expeditiously and reports such to regulatory agencies, then the environment and public health are the clear beneficiaries.

The Virginia law, of course—and I would encourage you to read it—does not in any way abrogate or relieve any entity from doing what it is required to do by statute, regulation, order or permit. As examples, the Virginia statute provides a limited privilege; however, the privilege is very limited. If you will examine the statute, the privilege does not extend to documents which demonstrate a clear, imminent and substantial endangerment to public health and the environment. It does not extend to documents or reporting required by law. It does not extend to documents prepared independently of any environmental audit; it does not extend to documents collected or generated in bad faith; and finally, it does not alter, limit, waive or abrogate any other statutory or common law privilege.

Mr. GEKAS. So to what does it attach?

Mr. KELSO. It attaches to everything else.

With respect to the immunity for civil penalties for violations voluntarily disclosed, again, this immunity is limited as well. It is based on the proposition and requirement that if an entity that conducts an audit finds a violation and moves expeditiously to clean up the problem and reports such, with a compliance schedule, to the appropriate authority, the immunity will attach.

However, the immunity will not attach if it is inconsistent with Federal law requirements, it cannot be afforded if voluntary disclosure is already required by law, regulation, permit or administra-

tive order, and cannot be afforded if the voluntary disclosure has been made in bad faith.

In light of the limited enforcement and compliance resource also available to government agencies, as well as the widely utilized mechanism of self-reporting and self-policing found in environmental statutes, the Commonwealth embarked on a policy based on the goal of ensuring environmental compliance utilizing multiple tools, including voluntary assessments, as opposed to relying solely on the traditional command and control approach. As the statute in Virginia shows, there are clear safeguards to prevent environmental bad actors from misusing this privilege or immunity.

Moreover, Virginia's audit privilege law has overcome the chilling effect that traditional enforcement measures have on aggressive voluntary enforcement compliance efforts, a fundamental fact that we believe that the EPA policy, draft policy, fails to recognize.

In short, we believe that systematic and industrywide environmental compliance would be far better served with the limited immunity and limited privilege positions similar to the Virginia law. It is in that vein that we thought the provisions of House bill H.R. 1047 were wiser.

Thank you.

Mr. GEKAS. We thank the gentleman.

[The prepared statement of Mr. Kelso follows:]

PREPARED STATEMENT OF HARRY H. KELSO, DIRECTOR OF ENFORCEMENT AND POLICY, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Good morning. My name is Harry Kelso, and I serve as Director of Enforcement and Policy at the Virginia Department of Environmental Quality, the agency of the Commonwealth of Virginia charged with environmental regulation, permitting, and enforcement.

BACKGROUND OF AUDIT DEBATE

As background, the issue of environmental audits and any protections afforded therefrom, have been the subject of debate within the federal government at least since EPA issued its Audit Policy of 1986, in which it sought to achieve an appropriate balance between its desire to detect violations and its concurrent desire to encourage industry to conduct audits, uncover environmental problems, and to correct them. Demonstrating the federal government's skepticism about any audit privilege, the Assistant U.S. Attorney General for the Justice Department's Environment Division wrote a March 1989 letter to the Attorney General of Arizona expressing the Department's serious concerns regarding proposed Arizona state legislation which would have established a privilege arising out of environmental audits. Specifically, the Assistant Attorney General articulated the Department's view that a privilege against disclosure of internal company environmental audits could hinder effective state and federal enforcement of environmental laws and, moreover, could deny government officials the requisite access to information essential to meeting their statutory charge of protecting public health and the environment. Furthermore, the Assistant Attorney General reasoned that such entities are afforded protections by and through existing privileges, including the attorney-client and attorney work product privileges.

Since 1989, similar letters from the federal government, usually from different officials at EPA, have been sent to officials of various states contemplating environmental audit legislation. The federal responses, uniform in their strident tone against such audit legislation, ranged from threatened increased federal enforcement in delegated environmental programs to pledges to cutoff funding for delegated grant mandates. The Commonwealth of Virginia was the recipient of one such "warning shot": in the midst of this year's legislative debate in the Virginia General Assembly over this issue, Virginia Department of Environmental Quality Director Peter Schmidt received such a letter from EPA. Despite this EPA warning, the General Assembly shortly thereafter passed the state environmental audit legislation

and Governor George Allen signed it into law. In March, only weeks after legislative passage of the Virginia legislation, President Clinton reversed the EPA posture in announcing his new position, which recognized a different federal attitude—one of cooperation and incentives for good behavior, rather than a "command and control" approach. This new Clinton policy includes incentives for environmental compliance, including a 180 day enforcement grace period for small businesses and an effort to seek reduced penalties for companies which voluntarily disclose and correct violations. In April, EPA submitted for public comment a new interim policy statement that reflects the federal government's startling and much-welcomed change of heart which recognizes the legitimate environmental benefits which can be gained from providing incentives for pro-active environmental assessment and compliance. The new EPA policy does not go far enough; everybody knows—particularly litigators—that courts are guided by statutes and regulations; policies, particularly those that have not completed notice-and-comment rulemaking, are little more than weak authority in courts. Without statutory relief via an audit privilege, the private sector cannot be expected to take the bold risk of discovering and divulging their own environmental problems.

NARROWLY TAILORED PRIVILEGES AND IMMUNITIES

The metamorphosis of the debate over environmental audits and privileges begins with the well settled legal proposition, articulated by the U.S. Supreme Court, "that the creation of evidentiary privileges contravene the fundamental principle that the public has a right to every man's evidence [and therefore should be] strictly construed." *Trammel* v. *U.S.*, 445 U.S. 40(1980) and *U.S.* v. *Nixon*, 418 U.S. 683 (1974). Recognizing this policy of narrow privilege construction, there is considerable precedent in U.S. jurisprudence for the creation of limited privileges. Most—if not all—privileges afforded in common law and federal law are very limited in scope and are constructed to achieve three goals: First, the goal of maintaining the confidentiality and sanctity of particular relationships. Examples include the marital privilege, attorney-client and attorney work product privileges, doctor-patient privilege, and clergy parishioner privilege. Second, these privileges are also constructed in order to encourage the frank discussion of difficult problems without the fear of outside publication or activity. It should be noted that even the federal government itself enjoys certain privileges shielding government documents from publication, embodied in the multiple exceptions to the Freedom of Information Act. A key example is the "deliberative process" privilege, which ensures the robust, open debate that regularly occurs in government agencies over the development of policies and regulations. The Commonwealth of Virginia's own Freedom of Information Act encapsulates similar limited privileges. Finally, and most relevant to our current topic, privileges are established to ensure that total system efficiencies are gained. In this case, the system we are concerned with is the environment. The environmental audit privilege is designed to ensure that we reap maximum environmental benefits while balancing our need to ensure that environmental strictures can be appropriately enforced. Thus, there is a clear trail in U.S. jurisprudence for the enactment of certain limited privileges.

As a statutory policy goal, we are convinced that encouraging environmental audits and pro-active efforts to correct environmental violations will inevitably result in regular and broader industry compliance. Already, industry is responding positively this forward-thinking approach. Simultaneously, we are revisiting our own state agency enforcement structure and making more staff available for compliance assistance in our regional offices, while also maintaining the traditional enforcement mechanisms for recalcitrant violators. Thus, instead of relying solely on the more cumbersome enforcement efforts, this approach will augment the traditional enforcement tools and lead to more statutory and regulatory compliance, meeting the requirements of the different environmental laws.

VIRGINIA LEGISLATION

It was in this narrowly-constructed context, as well as following the enactment of similar legislation in several other states, that the Commonwealth of Virginia enacted its own environmental assessment legislation earlier this year. It provides incentives for voluntary disclosure and pro-active environmental corrections, based on the view that if an entity takes the initiative to determine any environmental compliance problems, cleans them up expeditiously, and reports such to regulatory agencies, then the environment and public health are the clear beneficiaries. The Virginia law, of course, does not in any way abrogate or relieve an entity from doing what it is required to do by statute, regulation, order, or permit. The 1995 Virginia

legislation is similar, in great part, to the legislation sponsored by Congressman Hefley and others. The key elements to the Virginia legislation are:

1. To authorize a *limited* privilege for documents collected, generated or developed during an environmental assessment;
2. to create a mechanism for enforcing the privilege and determining those documents which are covered by such privilege; and
3. to establish a limited immunity against civil administrative or judicial penalties for violations disclosed voluntarily and corrected diligently.

During the legislative debate in the Virginia General Assembly, it was the privilege and the immunity, albeit limited, which prompted the most significant questions.

1. With respect to the privilege shielding the publication of an environmental assessment, the Virginia law limits the privilege as follows:

The privilege does not extend to a document which demonstrates a clear, imminent, and substantial endangerment to public health or the environment;

The privilege does not extend to documents required by law;

The privilege does not extend to documents prepared independently of the voluntary environmental assessment process;

The privilege does not extend to documents collected or generated in bad faith;

The privilege does not alter, limit, waive or abrogate any other statutory or common law privilege.

2. With respect to the immunity afforded against civil penalties for voluntarily disclosed violations, the immunity is limited as well:

The immunity must be consistent with requirements imposed by federal law;

The immunity cannot be afforded if the voluntary disclosure of information is already required by law, regulation, permit or administrative order;

The immunity cannot be afforded unless the voluntary disclosure of an environmental violation, provided to a state or local government agency promptly after learning of the violation from an environmental audit, is followed by correction in a diligent manner in accordance with a compliance schedule submitted to the agency;

The immunity cannot be afforded if the voluntary disclosure has been made in bad faith;

The immunity section does not bar the institution of a civil action claiming compensation for injury to person or property against an owner or operator.

In light of the limited enforcement and compliance resources available to government agencies, together with the widely-utilized mechanism of self-reporting and self-policing found in the environmental statutes, the Commonwealth embarked upon a policy based on the goal of ensuring environmental compliance through the utilization of multiple tools—including voluntary environmental assessments—as opposed to relying solely on the traditional and cumbersome enforcement approach. Furthermore, as the statutory limitations show, there are clear safeguards to prevent environmental "bad actors" from misusing this privilege or immunity. Moreover, Virginia's audit privilege law has overcome the chilling effect that traditional enforcement measures have on aggressive, voluntary environmental compliance efforts—a fundamental fact that the new interim EPA policy fails to recognize. In short, we believe that systematic, and industry-wide environmental compliance will be far better served with the immunity provisions similar to the Virginia law.

H.R. 1047

The components of Congressman Hefley's bill are very similar to the three components to the Virginia legislation: a limited evidentiary privilege; a mechanism for enforcing the privilege and determine those documents which are covered by such privilege; and limited immunity. We applaud Congressman Hefley for his insightful legislation, for we believe it will achieve environmental compliance results far more expeditiously than what has been achieved utilizing the current, "command and control" mechanism.

CONCLUSION

The creation of a limited environmental audit privilege and limited environmental immunity will be an incentive to encourage businesses to conduct thorough and frequent self-audits with respect to the environmental aspects of their operations. By removing the disincentives that currently exist for "good actors" to put their environmental house in order, improved environmental management and the reduced possibility of insult to the environment and public health will necessarily occur. These strides will serve as a dramatic step towards rewarding the pro-active, sys-

tematic, private-sector-led environmental improvements and away from relying solely upon the traditional notions of the command and control regulatory scheme.

Mr. GEKAS. We now turn to Mr. Ronald.

STATEMENT OF DAVID W. RONALD, ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL ENFORCEMENT SECTION, ARIZONA ATTORNEY GENERAL'S OFFICE

Mr. RONALD. Good morning, Mr. Chairman and members of the subcommittee. I am David Ronald, assistant attorney general for the Environmental Enforcement Section of the Arizona Attorney General's Office. I am pleased to have this opportunity to present the views of the Arizona attorney general on the creation of an evidentiary privilege for information contained in voluntary environmental self-evaluations; and I would also ask that my written materials be incorporated and become a part of the record.

Mr. GEKAS. Without objection, it is so ordered.

Mr. RONALD. Thank you, Mr. Chairman.

By way of background, I should explain that I first became involved in discussions regarding the creation of such a privilege in Arizona in 1989. A bill similar to H.R. 1047, creating an environmental self-evaluation privilege, was introduced in the Arizona Legislature. Then Attorney General Bob Corbin opposed the privilege, believing that it would create a veil of secrecy that would create additional distrust between government and industry, as well as distrust by the public of court proceedings, shielded from the public through in camera secret proceedings.

The privilege bill, dubbed the Polluter Protection Act by Arizona newspapers, was defeated. Prior to its defeat in 1989, letters from the U.S. Department of Justice and the Environmental Protection Agency were sent at our request to Attorney General Bob Corbin, joining him in opposing the enactment of the privilege stating, among other things, that the bill would cause environmental enforcement to become mired in motions to quash, subpoenas to suppress evidence and to compel discovery.

I note that because the position of the Department of Justice and U.S. EPA has been consistent through at least the past two administrations, this last legislative session in Arizona saw a second effort to pass a law creating an environmental self-evaluation privilege. Current Attorney General Grant Woods opposed the enactment of the privilege as did every county attorney in Arizona and the director of the Arizona Department of Environmental Quality. After the bill narrowly passed the Arizona House and Senate, it was vetoed by Gov. Fife Symington.

Attorney General Grant Woods supports the enactment of the new policies, regulations or laws on the State level and at the Federal level that ensure that businesses that voluntarily disclose environmental violations to regulatory agencies as soon as they discover them, whether through an environmental audit or the implementation of an effective compliance management system, are not in most instances penalized by the Government. If, as a result of the violation, actual harm has resulted, if a significant economic benefit has accrued to the company as a result of noncompliance, if the violations are repetitive in nature or if the violations constitute criminal conduct, it may be necessary to impose sanctions

while recognizing that the company is entitled to some penalty mitigation for its voluntary disclosure.

The Environmental Protection Agency and the American Bar Association Section on Natural Resources, Energy and Environmental Law have succeeded in initiating discussions between regulators, members of regulated communities and members of various public interest groups to explore potential solutions to the concerns industry has regarding the use of information from environmental audits or compliance management systems by the Government in citizen suits or by plaintiffs in toxic tort lawsuits. They should both be commended for their efforts.

The solution embodied in H.R. 1047 of creating a conditional or qualified evidentiary privilege established through secret judicial proceedings will create more harm than good. Decisions upholding the privilege would be made in those secret, in camera proceedings; thus, there could be no critical review of the decision by either concerned citizens or by legislators, including yourselves.

The consistency of such decisions would suffer by virtue of the fact that the decisionmaking power would be left to the individual Federal district court judges throughout the United States, who in all probability would have to appoint special masters to examine the volumes of documents submitted to prove that the person asserting the privilege achieved compliance in a period of time that is reasonable and adequate to achieve compliance.

A better approach would be the enactment of a rule or statute that would ensure that companies would not be penalized for self-disclosed violations, whether discovered in environmental audits or through the implementation of effective compliance management systems.

The interim policy on environmental audits announced by the Environmental Protection Agency on March 30 of this year is a step in that direction. With some revisions, it may well provide businesses with the assurance that they need that they will not be penalized by the Government for self-disclosed violations that are promptly corrected. There is also good reason to believe that the interim policy, if enacted into a rule, could also provide companies with sufficient protection from citizen suits based upon the self-disclosed violation.

The people in Arizona, like the citizens of many States, have made it clear that they want the Federal Government to reduce its role in State and local affairs. They do not want the Federal Government, however, to disappear completely. There is a role that only the Federal Government can perform in areas such as transportation, communications, civil rights and in environmental protection. There is a need to establish a national standard of environmental protection that should serve as a minimal level to be adhered to by the States.

As with transportation issues and communications issues, environmental issues affect all of the States. The ability of businesses to compete on a level playing field within the 50 States is affected by environmental laws in those States and the enforcement therein. The environmental problems of one State may affect adjacent States. Air pollution and water pollution do not recognize political boundaries. The privilege laws passed by either the 13 or 14 States

to date have energized the dialog we are now engaged in. The privilege laws already enacted, however, should not be allowed to subvert the legitimate interests the Federal Government has in ensuring the uniform and consistent enforcement of laws designed to protect the environment.

The list of things we can fix is long. Many environmental laws are too complex, too confusing and do not serve the purpose for which they were intended: protection of the environment. The ability of the Environmental Protection Agency to improve its regulations or adopt new enforcement policies or rules may be restricted by current law and the ability of the States to promulgate new regulations that provide for a 100-percent penalty reduction for self-disclosed violations under certain conditions may also be restricted by current law. These issues must be addressed. The enactment of privilege legislation to deal with these problems would be like pouring perfume on a pig and would simply create more secrecy, lead to more public distrust of government and industry, increased litigation and further clog the courts. Instead it is time to clean up the pig.

Thank you for your time and attention.

Mr. GEKAS. We thank the gentleman.

[The prepared statement of Mr. Ronald follows:]

PREPARED STATEMENT OF DAVID W. RONALD, ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL ENFORCEMENT SECTION, ARIZONA ATTORNEY GENERAL'S OFFICE

Mr. Chairman and members of the Subcommittee: I am David Ronald, Assistant Attorney General for the Environmental Enforcement Section of the Arizona Attorney General's Office. I am please to have this opportunity to present the views of the Arizona Attorney General on the creation of an evidentiary privilege for information contained in voluntary environmental self-evaluations.

By way of background, I should explain that I first became involved in discussions regarding the creation of such a privilege in Arizona in 1989. A bill similar to H.R. 1047, creating an environmental self-evaluation privilege, was introduced in the Arizona legislature. Attorney General Bob Corbin opposed the privilege believing that it would create a veil of secrecy that would create additional distrust between Government and Industry, as well as distrust by the public of court proceedings shielded from the public through *in camera* proceedings. The privilege bill, dubbed the polluter protection act by Arizona Newspapers was defeated. Prior to its defeat in 1989, letters from the United States Department of Justice and the Environmental Protection Agency were sent to the Arizona Attorney General joining him in opposing the enactment of the privilege stating, among other things, that the bill would cause environmental enforcement to become mired in motions to quash, subpoenas to suppress evidence, and to compel discovery.

This last legislative session in Arizona saw a second effort to pass a law creating an environmental self-evaluation privilege. Attorney General Grant Woods opposed the enactment of the privilege, as did every County Attorney in Arizona, and the Director of the Arizona Department of Environmental Quality. After the bill narrowly passed the Arizona House and Senate, it was vetoed by Governor Fife Symington.

Attorney General Grant Woods supports the enactment of new policies, regulations or laws, at the state level and at the federal level that insure that businesses that voluntarily disclose environmental violations to regulatory agencies as soon as they discover them, whether through an environmental audit, or the implementation of an effective compliance management system, are not, in most instances, penalized by the government. If, as a result of the violation, actual harm has resulted, if a significant economic benefit has accrued to the company as a result of noncompliance, if the violations are repetitive, or if the violations constitute criminal conduct, it may be necessary to impose sanctions while recognizing that the company is entitled to some penalty mitigation for its voluntary disclosure.

The Environmental Protection Agency and the American Bar Association's Section on Natural Resources, Energy and Environmental Law have succeeded in initiating discussions between regulators, members of the regulated community and members

of various public interest groups to explore potential solutions to the concerns industry has regarding the use of information from environmental audits, or compliance management systems by the government, in citizen suits or by plaintiffs in toxic tort lawsuits. They should both be commended for their efforts.

The solution embodied in H.R. 1047 of creating a conditional evidentiary privilege established through secret judicial proceeding will create more harm than good. Decisions upholding the privilege would be made in secret judicial proceedings. Thus, there could be no critical review of the decision by concerned citizens or legislators. The consistency of such decisions would suffer by virtue of the fact that the decision making power would be left to individual federal district court judges throughout the United States, who in all likelihood would appoint special masters to examine the volumes of documents submitted to prove that the person asserting the privilege achieved compliance in a period of time that is reasonable and adequate to achieve compliance.

A better approach would be the enactment of a rule or statutes that would insure that companies would not be penalized for self-disclosed violations, whether discovered in environmental audits or thorough the implementation of effective compliance management systems. The interim policy on environmental audits, adopted earlier this year by EPA, is a step in that direction. With some revisions, it may well provide businesses with the assurance they need that they will not be penalized by the government for self-disclosed violations that are promptly corrected. There is good reason to believe that the interim policy, if enacted into a rule, could also provide companies with sufficient protection from citizen suits based on the self-disclosed violations.

The third aspect of the problem involves the use of self-disclosed information in toxic tort lawsuits. Arizona has enacted a statute dealing with the use of self-evaluative information in tort lawsuits involving products liability claims. It would seem that the concepts in that statute might be used as a basis for resolving the toxic tort issue at the federal level. I would be happy to supply copies of that legislation to any interested members of the subcommittee at a later time.

The voters in Arizona, like the voters in many states, have made it clear that they want the federal government to reduce its role in state and local affairs, but not that they do not want the federal government to disappear completely. There is a role that only the federal government can perform in areas such as transportation, communications, civil rights, and in environmental protection.

There is a need to establish a national standard of environmental protection that should serve as a minimal level to be adhered to by the states. As with transportation issues and communications issues, environmental issues affect all of the states. The ability of businesses to compete on a level playing field within the fifty states is affected by environmental laws. The environmental problems of one state may affect adjacent states. Air pollution and water pollution do not recognize political boundaries.

The privilege laws passed by 13/14 states to date have energized the dialogue we are not engaged in. The privilege laws enacted in 13 states should not be allowed to subvert the legitimate interest the federal government has in insuring the uniform and consistent enforcement of laws designed to protect the environment.

The list of things we can fix is long. Many environmental laws are too complex, too confusing, and do not serve the purpose for which they were intended, protection of the environment.

The ability of EPA to improve its regulations or adopt new enforcement policies or rules may be restricted by current law; and the ability of the states to promulgate new regulations that provide for a 100% penalty reduction for self-disclosed violations under certain conditions may be restricted by current law. These issues must be addressed. The enactment of privilege legislation to deal with these problems would be like pouring perfume on a pig and would simply create more secrecy, lead to more public distrust of government and industry, increase litigation, and further clog the courts.

Instead, it's time to clean up the pig.

Thank you for your time and attention.

THE CASE AGAINST AN ENVIRONMENTAL AUDIT PRIVILEGE

By

David Ronald*

In the steamy heat of a Washington, D.C., late July morning, more than four hundred corporate lawyers and industry executives gathered to attend a two-day meeting, called by U.S. EPA, to discuss the use of internal environmental audits by government environmental enforcers. Industry has called for a statutory privilege that would shield information gathered in an environmental audit from government officials, citizens' groups, and toxic tort plaintiffs. Four states — Colorado, Kentucky,[1] Indiana, and Oregon — have heard that call and have passed laws enacting environmental audit privileges of varying breadth and effect. Other states have similar legislation pending.

The call for such a privilege may seem, at first glance, to be fair and, perhaps, even an environmentally sound idea. Industry spokesmen argue that current federal policy chills audits, that businesses avoid self-audits because they are afraid they will be subject to penalties and prosecution if the audits turn up problems in the company.[2] An earlier article in the *Journal* argued that the federal government should develop protections for companies that develop effective auditing programs.[3]

There are, however, three main problems with addressing industry's *perception* that environmental prosecutors *might* misuse environmental audits by granting statutory privilege status to environmental audits. First, evidentiary privileges are, in general, quite limited in United States jurisprudence. This is so for a good reason. Privileges limit access to relevant and often very persuasive evidence. There are circumstances where privileges are clearly warranted. However, the need for a privilege should be *unquestionably* demonstrated before the rather dramatic step of creating a new evidentiary privilege is taken.[4] An informal survey of state enforcement officials indicates that voluntary audit reports have only *rarely* been used in enforcement cases. Therefore, the need for audit privilege has not yet been persuasively established.

Second, creating a new class of secret information runs counter to the public disclosure trends in environmental law over the last several years. The right-to-know laws, disclosure rules mandated by the Securities and Exchange Commission,[5] and even community "good neighbor" agreements all require or encourage greater disclosure of information to the public. Creating a new privilege that withholds information from the public or its governmental representatives has the potential to increase public suspicion about the activities and motives of the companies. This step should only be taken if there is a clearly-established need to do so.

Finally, and most importantly, privilege legislation in the environmental audit field is likely to lead to increased litigation rather than increased cooperation. Alternative approaches, such as audit policies developed through open dialogue with affected parties, negotiated audit agreements, and more comprehensive compliance incentive programs, would be much more effective in building constructive working relationships between government and regulated

*David Ronald is an Assistant Attorney General and Chief of the Environmental Crimes Unit for the Arizona Attorney General's Office. This article is taken largely from the testimony he presented at the July 27-28, 1994, environmental audit meeting at the Mayflower Hotel in Washington, D.C.

entities that could truly produce positive environmental results.

Is There Industry Justification for the Privilege?

A survey of all fifty states conducted by the National Association of Attorneys General and the four regional environmental enforcement projects[6] just prior to the July 27–28 meeting in Washington revealed only one case that involved the use of information contained in a voluntarily initiated environmental audit in a civil penalty action.

The case reported was an action brought by the Pennsylvania Department of Environmental Resources against Waste Management of Pennsylvania (WMX).[7] In that case, WMX found, through an audit, that the persons hired by WMX to operate a landfill were keeping two sets of books, one of which revealed that the landfill was taking in more waste than allowed by its permit. Pennsylvania law did not provide for agency discretion in this case, and WMX was fined $4 million, the mandatory minimum fine allowed by state law, for the violations discovered. It should be noted that, although there was evidence of fraud, the state chose not to seek criminal prosecution because the violations were voluntarily reported by the company.[8]

In the criminal enforcement context, there are only two cases that have been cited in which the prosecutor used information from voluntarily-initiated environmental audits.[9] In both of these cases, however, the defendant became aware of violations as a result of the audit and was slow to implement corrective activities, suggesting knowing and unlawful disregard for the law.[10]

In 1992, the Arthur Andersen Company published a survey in the *National Law Journal*.[11] The survey indicated that many companies have never undertaken a formal survey of their environmental compliance. The survey also indicated that the relatively new threat of jail for corporate executives for environmental violations is an overwhelming concern for general counsel. But the response to this perceived peril seems to be a constructive one. More than one-third say their companies would increase the number and scope of self-audits of environmental compliance if the U.S. Sentencing Commission, as expected, enacts guidelines that call for mitigation in criminal cases for companies with effective compliance programs. Of those surveyed, only sixteen percent had altered the environmental auditing procedure out of fear that the company's findings would be used against it. James Morgester, Chief of the Compliance Division for the California Air Quality Control Board, has stated that the number of companies conducting environmental audits has increased in direct proportion to the increase in the level of civil and criminal enforcement in California.[12]

Before deciding how to address the issue of disclosure of environmental audit information, there must be a better understanding of the reasons underlying a company's decision whether to undertake an environmental audit. Is it the fear of enforcement action by government agencies or are there other factors that cause companies to opt not to conduct environmental audits? If it is only the fear of civil or criminal prosecution with which industry is concerned, there are remedies far less radical than the establishment of a new evidentiary privilege.

James Moore, spokesman for the industry coalition representing the Compliance, Management and Policy Group (CMPG), a

leading advocate for the adoption of the Uniform State Environmental Privilege Act,[13] stated in a recent article[14] that, in addition to advocating privilege for environmental audits, industry wants to develop a means to ensure that "outsiders," such as citizen groups, are not allowed to "circumvent" the privilege and publicize the results of a self-audit. Companies have also expressed a concern that plaintiffs in toxic tort litigation might have access to voluntarily initiated environmental audits.[15]

Thus, apparently, industry's position is that an environmental audit privilege must be sweeping, applicable not only to government officials but to concerned citizens, injured plaintiffs, the media, the public, and legislators. Such a broad evidentiary privilege is in marked contrast to a less drastic approach that could be taken if the need for addressing governmental use of voluntary audit information is demonstrated. These approaches include use immunity for environmental audit information, stricter policy statements by environmental agencies, and legislation establishing affirmative defenses to civil penalty actions or criminal prosecutions by government agencies.

Current Incentives for Environmental Audits

Currently, there are many incentives for companies to conduct environmental audits.[16] An effective auditing program reduces a company's risk of fines and litigation costs by identifying and providing an opportunity to correct noncompliance *before* the government or a private citizen initiates action. By identifying non-compliance, audits allow a regulated entity to manage pollution control affirmatively over time instead of reacting to crises intermittently. An effective audit program can help management achieve cost effective compliance and minimize risk.

Furthermore, frequent and open scrutiny heightens awareness and often prevents violations. Companies conducting environmental audits invite investment and provide assurances demanded by shareholders, creditors, and other investors. Detailed knowledge of a facility's conditions helps to expedite negotiations for the sale of an asset, facilitates purchasing pollution insurance, speeds negotiations with lending institutions for loans, and contributes critical information for planning future growth. A credible program may make the difference in both retaining the loyalty of the consumer at the retail level and in soliciting valuable contracts from corporations that have made environmental considerations part of their purchasing and contracting practices. Given the obvious advantages of an open environmental audit program and the lack of data demonstrating that companies have been penalized by government agencies using voluntarily-initiated environmental audit information, it is clear that any fear is based on perception and not on reality.

However, states have responded to industry's concern by promulgating policies on environmental auditing and voluntary disclosure. Most of these policies closely follow those adopted by U.S. EPA and the Department of Justice. The intent of these policies is to provide the regulated community with information about how a state exercises its enforcement discretion with respect to such factors as the facility's voluntary disclosure of violations, use of environmental audits, and other procedures to ensure compliance with all applicable environmental laws and regulations.[17]

The Department of Justice's policy[18] expresses a commitment to encourage self-auditing and sets out factors for determining whether to initiate a

prosecution : (1) Whether the entity made voluntary, timely, and complete disclosure of the matter under investigation; (2) the degree and timeliness of cooperation; and (3) the existence and scope of any regularized, intensive, and comprehensive environmental compliance program. U.S. EPA's policy[19] states that the agency will not routinely request environmental audit reports. In determining enforcement responses to violations, the agency is to take into account a company's honest and genuine efforts to avoid and promptly correct violations and underlying environmental problems.

However, most state policies and the federal policy make clear that audit reports may not be used to shield information otherwise reportable or accessible to the regulatory agency. Furthermore, where companies place their management practices at issue by raising environmental audits as a defense or when state of mind or intent are relevant to the inquiry, such as in criminal investigations, audits will be requested. These policies have been successful in ensuring that companies are not penalized for disclosing information contained in voluntarily initiated environmental audits. Their success may be measured by the lack of cases in which regulatory agencies or criminal prosecutors have used audit information to penalize a company that has voluntarily disclosed environmental violations and has taken the proper steps to correct those violations.

Effect of An Audit Privilege

If, then, government has not and does not routinely use environmental audit information, why should not states adopt the model legislation, the Uniform State Environmental Privilege Act, proposed by CMPG? What difference would it make to environmental prosecution? The difficulty with such legislation is the potential for conflict and litigation rather than cooperation and the fact that it would apply not only to government enforcement actions, but also to victims of toxic torts, citizen groups, and the public in general. Additionally, the cloak of secrecy established by such a law is contrary to the concept of open and public corporate environmental responsibility. Examples of the problems created by the Uniform State Environmental Audit Privilege Act include the following:

1) A decision that information was privileged would prevent others who were not party to the enforcement action brought by the government from viewing or using the information. Thus, there could be no critical review of the decision by concerned citizens or legislators since they would be barred from seeing the privileged material.

2) A judge, rather than a jury, would determine whether the privilege was being asserted for a fraudulent purpose.

3) A judge, rather than the administrator of the regulatory agency or a jury, would determine whether appropriate efforts were pursued with reasonable diligence to correct noncompliance discovered by an environmental audit prior to information concerning noncompliance being disclosed.

4) The government would have to have probable cause to believe that a crime was committed before it would be entitled to information contained in an environmental audit report, even if the evidence of the crime itself were locked up tightly inside the secrecy of the report. Furthermore, if, after reviewing the information contained in an audit report in an *in camera* proceeding, the judge were to rule that the

information was privileged, the state would have to prosecute its case and demonstrate that none of the evidence obtained subsequent to the *in camera* proceeding was tainted or related to the secret audit report. This burden would be virtually impossible to meet.

5) Even if information claimed to be privileged by the company were not covered by the privilege, the government would have to demonstrate its relevance to a civil or criminal proceeding before the court would allow government or anyone else to see or use the information. It is unclear whether a finding of relevance with respect to one proceeding is sufficient to overcome the privilege.

6) The environmental audit field has no national standards, no certification nor licensing requirements for auditors. Many people differ on the terms used to define "environmental audit." Arguably, a bid proposal for a cleanup might be considered privileged.

7) The breadth of the privilege is not carefully delineated. Arguably, every witness interview, every document, and every scientific test gathered pursuant to an audit will become secret. Both current and former employees with information about noncompliance might be bound by the privilege.

It is clear that the implementation of such a privilege will add significantly to litigation costs and, thus, decrease the government's ability to take enforcement actions. Environmental enforcement efforts by state and federal agencies could become mired in motions to quash subpoenas, to suppress evidence, and to compel discovery. Grand jury investigations would be impeded if the government were routinely forced to go to court to demonstrate the inapplicability of the privilege in order to subpoena documents, scientific reports, and witnesses.

Ironically, the proposed model legislation would not have insulated the information in the Pennsylvania case cited above from discovery since the information was *required* to be maintained and made available to the regulatory agency. Similarly, the information contained in the environmental audits in the two criminal cases would not have been shielded under the model law because the companies were slow to correct the violation upon discovery. Therefore, if the uniform act had been in effect, the audit information would have been available in the only cases reported in the survey to have made use of audit information. However, had the legislation been in place, there would have been more layers of litigation prior to reaching the same or a similar outcome, at considerable extra expense to both the government and to the regulated companies and with no added benefit to the environment.

The record and experience of environmental enforcement show that industries that use environmental audits in good faith have little to fear if their only concern is civil penalty actions or criminal prosecutions by the government. However, if industries fear that they will have to pay to remediate a site or reach compliance and wish not to be held accountable, there can be reason to hide information from the regulatory agency from the outset. Responsible firms know the value of environmental audits; less responsible companies don't conduct them.

It is unclear why anyone should believe that polluters are likely to develop environmental consciences if legislation is passed allowing them to shield potentially damaging evidence contained in environmental audits. How is the public protected if a firm starts a cleanup when people living downstream or downwind of a serious problem are denied access to the data in the company's environmental audit? If a problem is found, it is preferable, both from an

environmental and business standpoint, to inform the appropriate state or federal agency and cooperatively implement a clean-up plan. Once the problem is uncovered, stonewalling on pollution leads to greater costs. Businesses that pollute the soil, the water, and the air should be held accountable and such accountability is fostered, not by secrecy, but by openness.

The proposed legislation would gag conscientious workers who feel compelled to "blow the whistle" based on information from those environmental audits. After years of negligence, the company could begin an environmental audit. Should those years of negligence and pollution be forgiven simply because a company conducts an environmental audit? Should repeat violators be excused simply because they correct the violation each time it occurs? Is that fair to businesses who have been good neighbors and in environmental compliance? What is to prevent a business from conducting an environmental audit after it receives information that it is about to be inspected or in anticipation of litigation?

It is clear that only a business with something to hide would benefit from a law that turns data gathered from environmental audits into secret information. State and federal regulatory agencies would be kept mired in legal fights that had little to do with enforcing environmental protection. A shift in decisionmaking from experts in regulatory agencies to the courts would only add to the workload of judges who are already overburdened. The statutory establishment of such a privilege would allow for the improper manipulation or destruction of evidence of environmental violations or crimes, including the production of favorable sampling evidence or destruction of contemporaneous sampling evidence, before investigators could assess a violation closest to the time of occurrence. Under the time frames provided in the model legislation, up to seventy-five days could pass before the state would be able to obtain information contained in an environmental audit report. Such delay could jeopardize safety by letting health and safety problems go unresolved. Environmental consultants would face particularly difficult decisions when companies fail to respond to audits disclosing contamination problems which pose imminent threats to the public health and safety.

Conclusion

It is clear that there is a real and genuine concern being expressed by industry representatives concerning the availability of information found in environmental audits. That concern must be addressed. However, it is also clear that there are few, if any, cases that have been brought by state or federal environmental regulatory agencies or criminal prosecutors in which information obtained from voluntarily initiated environmental audits was used to obtain civil penalties or criminal convictions for environmental violations.

Industry and government together must determine the validity of the charge that environmental audits are not taking place because of fear that information will be used against responsible companies. If the evidence shows that this is a valid concern, narrowly drafted use immunity statutes can be crafted such as the one already in existence for cases brought under the Comprehensive Environmental Response, Compensation, and Liability Act.[20] Other statutes, similar to those in Arizona and Minnesota pertaining to air quality, can be drafted to allow notification and corrective action to be used as an affirmative defense in a criminal action. Agency policies could be adopted, such as EPA has done in enforcing section 5 of the Toxic Substances Control Act,[21] that would provide for reductions in civil penalty assessments based on voluntary disclosure.

It is clearly in the best interest of each citizen that businesses act in an environmentally responsible manner and this includes conducting environmental audits and addressing problems that are raised. If current government policy acts as a disincentive to the conduct of such audits, that problem needs to be addressed. But enacting a sweeping privilege would be like replacing a mechanically-sound car because it has a flat tire. The enactment of an environmental audit privilege would create wide-ranging changes, address areas of the law far beyond the fear of penalties and prosecution, and would do little or nothing to improve environmental compliance and good practices. Instead, such legislation would create more lengthy and more costly enforcement procedures with less cooperation between regulated businesses and government and a veil of secrecy that is antithetical to our legal system's concept of openness and disclosure.

If a problem exists, environmentally-responsible businesses, regulatory agencies, government and private attorneys, and public interest groups can surely find solutions that fix that problem without creating a host of additional problems that will cost more time and money for both regulators and the regulated community with no assured environmental benefit.

ENDNOTES

1. John Gillig, Assistant Attorney General and Environmental Special Counsel in the Kentucky Attorney General's Office, has written a comparison of the laws passed by Oregon and Kentucky. It is available to state attorneys general offices through NAAG. The comparison notes some problems with respect to the model proposed legislation.

2. *See* Marianne Lavelle, *Audit Privilege Mobilizes EPA, Business Bar*, NAT'L L.J., Aug. 8, 1994, at A1, col. 1.

3. Cindy H. Evans, *Removing Barriers to Environmental Innovation*, NAT'L ENVTL. ENFORCEMENT J., Dec. 1991/Jan. 1992, at 3. "Environmental compliance undoubtedly would be enhanced if companies were assured that self-identification and correction of environmental problems would not result in punishment. Compliance would be further enhanced if, upon finding an instance of noncompliance, a company could direct its resources toward preventing recurrence of the problem, rather than paying penalties and lawyers' fees." Id. at 9.

4. In its recently adopted resolution opposing "any regulation or legislation involving environmental self audits which provides for privileges (statutory or common law), immunity or qualified immunity," the National District Attorneys Association noted that there are no similar self-policing type audits with privileges in any other area of the criminal law. The resolution also states that "deterrence of environmental offenses is of primary concern to the citizenry, including other law abiding businesses, who spend the time and money complying with environmental statutes and cannot compete with business operating in an unlawful manner" and further notes that such an immunity would benefit large corporations because smaller companies and businesses normally do not have the resources to complete comprehensive self-audits; therefore, such an enforcement tool would be flawed and anti-competitive. Resolution of the National District Attorneys Association, July 24, 1994, Newport Beach, Cal.

5. *See, e.g.*, Richard Y. Roberts, *Disclosure of Environmental Liabilities in Documents Filed With the Securities and Exchange Commission*, NAT'L ENVTL. ENFORCEMENT J., Mar. 1994, at 3.

6. These are the Northeast Environmental Enforcement Project, the Midwest Environmental Enforcement Association, the Western States Hazardous Waste Project, and the Southern Environmental Enforcement Network.

7. Information concerning prosecution of this case was provided by Keith Welks, Chief Counsel for the Pennsylvania Department of Environmental Resources.

8. Colorado reported using information from an environmental audit against Coors Brewing Company. However, the audit involved information required by law to be reported to the Colorado Department of Health. Patricia M. Nolan and Thomas P. Looby, *Coors' Fine in Line with Emissions Violations*, ROCKY MOUNTAIN NEWS, Sept. 3, 1993, and telephone interview with Colorado Assistant Attorney General Martha Rudolph (July 6, 1994). However, Coors Brewing Company disputes this account and maintains that the information in the audit was *not* required by law. Telephone interview with Jon Goldman, Communications Manager, Coors Brewing Company (Aug. 17, 1994).

9. United States v. Weyerhaeuser and United States v. Dexter Corporation.

10. Michael J. Walker, *Trust in Auditing, But Verify*, ENVTL. F., Jan./Feb. 1992 at 41.

11. Marianne Lavelle, *Survey: General Counsels Face Environmental Toll*, NAT'L L.J. SUPP., Mar. 16, 1992, at 2.

12. Mr. Morgester has served on the Steering Committee of the Environmental Auditing Forum for the past eight years and has taught Environmental Auditing at the University of California, Davis, for the past ten years. Mr. Morgester's comments were made in a telephone interview with the author (July 6, 1994).

13. CMPG members include the American Forest and Paper Association, the American Petroleum Institute, the Chemica

Manufacturers Association, the National Solid Waste Management Association, AT&T, Boeing, Browning Ferris Industries, General Electric, Monsanto, and Waste Management. Copies of the proposed legislation are available to state attorneys general offices from NAAG.

14. *Companies Say EPA Enforcement Policy Collides With Voluntary Audit Programs*, Daily Rep. For Executives (BNA), June 21, 1994, at A-7.

15. *See* Annette Crawley, *Environmental Auditing and the "Good Samaritan" Doctrine: Implications for Parent Corporations*, 28 GA. L. REV. 223 (1993).

16. *See also* Allen J. Danzig, Michael J. Walker, and Courtney M. Price, *Environmental Auditing: Reaching the Bottom Line in Compliance*, NAT'L ENVTL. ENFORCEMENT J., Jan. 1987, at 3.

17. For instance, both California and New Jersey have promulgated policies stating that information contained in an environmental audit that leads to timely and appropriate correction measures constitutes exculpatory information, not incriminating information, and, therefore, would not be used by the prosecution in a criminal case.

18. U.S. Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violators in the Context of Significant Voluntary Compliance Or Disclosure by the Violator (July 1, 1991).

19. 51 Fed. Reg. § 25,004 (July 9, 1986).

20. 42 U.S.C. § 9603(b).

21. Office of Compliance Monitoring, Office of Pesticides and Toxic Substances, U.S. EPA, TSCA § 5 Enforcement Response Policy (Aug. 5, 1988).

From the Assistant Administrator

CAA Section 507 Enforcement Response Policy

By
Steven A. Herman

Ever since EPA's Office of Enforcement was reorganized as the Office of Enforcement and Compliance Assurance (OECA), I am often asked to explain the significance of the new name. It seems to me that the underlying — although often unstated — question being asked is what does this change signify for the future direction of EPA's enforcement and compliance effort?

My answer is always the same. The mission of the Office of Enforcement and Compliance Assurance — the purpose behind the reorganization — is the smarter, more efficient use of all of our enforcement authorities in order to expand compliance with environmental laws The statistics for our traditional enforcement activities (size of penalties, criminal and civil referrals, and the like) have reached record levels over the last several years, and OECA will continue to maintain a bedrock commitment to enforcement in order to deter noncompliance.

At the same time, it is this very success that enables us to look for innovative ways to reach greater segments of the regulated community. OECA will develop additional strategies to assure overall compliance, using both formal enforcement tools to correct violations and industry-based and facility-specific assistance programs to prevent violations from occurring in the first place. We must strive to promote pollution prevention at every opportunity.

Mr. GEKAS. And we will entertain the statement of Ms. Cynthia Goldman.

STATEMENT OF CYNTHIA L. GOLDMAN, ESQ., GIBSON, DUNN & CRUTCHER, ON BEHALF OF THE COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY

Ms. GOLDMAN. Mr. Chairman, members of the subcommittee, my name is Cindy Goldman. I am testifying today in support of H.R. 1047 on behalf of the Colorado Association of Commerce and Industry, or CACI. CACI represents 1,500 Colorado businesses, 80 percent of which have 100 or fewer employees. We are pleased to be asked to testify today regarding H.R. 1047 because environmental audit privilege legislation has been a very important issue for our association for the past 6 years.

In 1989, Colorado was the first State to introduce audit privilege legislation; and in 1994, Colorado was the first State to pass both a privilege and voluntary disclosure law. By mid-1994, Colorado, Oregon, Kentucky, and Indiana had privilege laws. One year later, an additional 10 States have passed privilege laws. Seven of those include protections for voluntary disclosures, and Indiana this year passed additional legislation to protect voluntary disclosures.

Eleven States are currently considering such legislation and another four are expected to introduce bills later this year. Obviously, this is an issue that has caught the attention of States, and it is a very popular idea.

Since H.R. 1047 is very similar to Colorado's law, I wanted to share with you the experience that we have had in Colorado, although it has only been in effect about 1 year. While we don't have the number of companies that have increased their auditing, we believe, based on studies like the Price Waterhouse survey that you heard about earlier, that Colorado companies are conducting more audits and that the audits are more thorough.

We do have statistics, however, on companies that have voluntarily disclosed instances of noncompliance under the voluntary disclosure portion of our law. There are six instances where companies have disclosed and all of those disclosures have been by midsized companies.

One instance involves a boiler—you have heard about boilers earlier today—that was not properly permitted. The company identified that issue as a result of an audit. They described the problem to the health department in October 1994, and less than 3 months later all the paperwork was submitted to the health department for a permit to be issued for the boiler. So another source has been permitted in Colorado.

There have been some instances of acetone being discharged to the sanitary sewer system that were discovered as the result of an audit. Those practices have been discontinued.

Another instance of a voluntary disclosure is a company that identified significant air emission increases. They have gone to the health department, disclosed that information to them, and the health department is currently working with that company to identify what permits are necessary for them to come into compliance with the law.

CACI believes that these instances of noncompliance perhaps would not have been identified and certainly would not have been disclosed to the health department in Colorado absent the protections provided by Colorado's voluntary disclosure law. We certainly don't think the health department would have identified these issues on its own.

In addition, there has not been any litigation brought to date, under Colorado's privilege/immunity law.

While CACI is pleased there have been six instances of voluntary disclosure, obviously we think there would be greater utilization of law if it were not for threats of overfiling by EPA. While there are protections from State penalties for voluntarily disclosing instances of noncompliance, EPA can use that information to come in and essentially take a separate enforcement action against those companies. So in Colorado or in another State that has a voluntary disclosure law, if you voluntarily disclose you are essentially serving up an enforcement action to EPA or DOJ on a silver platter. That has some companies concerned and so they are not willing to come forward.

EPA obviously has not made their dislike of privilege laws very secret; as you have heard from the Virginia representative from DEQ, EPA has sent letters to various States urging them to not pass such laws. Virginia and Indiana are examples.

They have also testified before various State legislatures, like in Ohio, urging them to not pass such laws. Colorado received a letter addressed to its Governor urging him to veto Colorado's law in spite of the fact that it had passed overwhelmingly in the Colorado Legislature on bipartisan votes.

In addition, in the June 20, 1994, Federal Register notice announcing a public meeting on the 1986 EPA audit policy, EPA requested the four States that had laws at the time—Colorado, Oregon, Indiana, and Kentucky—to provide, quote, "documentary justification," close quote, for the passage of their laws.

More recently, in the interim policy statement that has been referenced, that was issued April 3, EPA has told the States with privilege/immunity laws that there will be consequences to those States that have laws. And if a State does have a law, its enforcement actions will be scrutinized more closely and there may be increased Federal enforcement in the States with privilege/immunity laws.

Finally, the threats are not just regarding enforcement. They are also regarding withdrawal of program delegation. Most Federal programs in the environmental area are developed at the Federal level, and delegated to States with EPA approval. When Colorado sought approval of its Clean Air Act permitting program, EPA qualifiedly approved it, but also included this language in the Federal Register notice, "If during program implementation EPA determines that this provision," referring to Colorado's law, "interferes with Colorado's enforcement responsibilities, EPA will consider this grounds for withdrawing program approval".

Colorado is not the only State to receive such admonition from EPA. Utah received similar language in the Federal Register notice of June 8, 1995. In addition, Colorado has been told that a process that has been going on for 10 years to obtain approval for the

Clean Water Act program may be jeopardized because of Colorado's law.

While Colorado is pleased with its audit privilege/voluntary disclosure law, again we think it would be better utilized if it were not for the threats of EPA. CACI urges the passage of H.R. 1047 because we believe States ought to be allowed to improve environmental quality in their States, and we also think that EPA should be prevented from effectively overriding the desires of 14 State legislatures and Governors.

I also ask that my written comments be incorporated into the record.

Mr. GEKAS. Without objection, it is so ordered.

[The prepared statement of Ms. Goldman follows:]

PREPARED STATEMENT OF CYNTHIA L. GOLDMAN, ESQ., GIBSON, DUNN & CRUTCHER, ON BEHALF OF THE COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY

Mr. Chairman, members of the Subcommittee, my name is Cindy Goldman and I am testifying on behalf of the Colorado Association of Commerce and Industry ("CACI"). CACI represents approximately 1,500 Colorado businesses, 80% of which have 100 or fewer employees. CACI appreciates the opportunity to testify regarding Colorado's environmental audit privilege and voluntary disclosure law, which has been an important issue for our Association for the past six years. In 1989, Colorado was the first state to consider an environmental audit privilege law, and was the first state to pass an audit privilege and voluntary disclosure law in 1994. At the end of 1994, four states had audit privilege laws; six months later, ten additional states have passed similar laws, seven with voluntary disclosure protection. In addition, approximately eleven state legislatures are actively considering such legislation, with another four expected to introduce legislation later this year.

POLICY REASONS FOR H.R. 1047

Incentives and Protections

Colorado Senate Bill 94–139, which is attached, is similar to H.R. 1047 in most respects. H.R. 1047 provides an evidentiary privilege for environmental audit reports and creates an immunity from certain penalties for voluntarily disclosing instances of noncompliance. The primary purpose is to maximize environmental compliance, thereby increasing protection of public health and the environment. In order to encourage companies to conduct compliance audits voluntarily, protections need to be provided and incentives need to be created. H.R. 1047 provides those protections and incentives but also protects against abuse and requires companies to achieve compliance in order to enjoy the protections provided under the law.

H.R. 1047 creates three different types of incentives to encourage voluntary compliance with environmental laws: (1) an incentive to investigate through its audit privilege; (2) an incentive to disclose through its immunity for voluntary disclosure; and (3) an incentive to remedy through its prompt response requirements. All of these incentives are discussed in more detail below. They clearly demonstrate a truth that has been lost on many prosecutors, regulators, and members of the environmental community: privilege/immunity laws do not "protect polluters." They encourage companies to comply with the law—more quickly, more cost effectively and more efficiently than traditional environmental enforcement.

CACI's member companies certainly want to comply with environmental laws and regulations but often find the laws or regulations confusing; even the most sophisticated companies with significant legal expertise find it difficult to definitively interpret or comply with each and every environmental regulation. Colorado companies are not unique in this respect. A *National Law Journal* article from August 30, 1993, reported that in a survey of in-house environmental counsel for 200 companies, two-thirds of those environmental counsel reported that they knew their companies were out of compliance with one environmental law or regulation. Again, this situation occurs not because companies do not care about complying with environmental laws and regulations, it occurs because of their complex nature.

While some companies, particularly larger ones, currently perform environmental audits, such audits are frequently performed under an attorney-client privilege—a protection that does not permit information to be shared with all employees. It also adds significant costs. In other instances, the company may have simply resigned

itself to the fact that such information could be discovered by a regulatory agency. However, small and mid-size companies often decide, for a number of reasons, not to perform environmental evaluations. In order to encourage all companies to investigate their own facilities, CACI believes, and the Colorado General Assembly agreed, it is critical to provide a mechanism to keep this information privileged from discovery. There may be appropriate circumstances for an environmental audit report to be subject to discovery, and H.R. 1047 provides a balanced approach to avoid abuse of the privilege.

Industry needs the certainty provided by H.R. 1047. Leaving EPA with the discretion to observe or ignore confidentiality of information voluntarily identified by a company presents a tremendous disincentive to conducting environmental audits. The Environmental Protection Agency's (EPA's) policies that simply promise information identified in an environmental audit report will not be used to "trigger" an investigation, that it will probably not be used for criminal prosecutions, or that the performance of an environmental audit may be a factor in reducing fines or penalties (although not economic benefit penalties), leaves too much uncertainty to provide an incentive to encourage a great many companies to conduct voluntary self-evaluations. Moreover, the experience of many CACI members is that such policies are often honored in the breach.

Furthermore, companies that are conducting audits and, as a result, identifying areas of noncompliance, are frequently torn between voluntarily disclosing this information to a regulatory agency—with the possibility of significant fines or penalties—or simply keeping the information to themselves and addressing the issues on their own. Colorado's law makes this decision somewhat easier for a company. Companies choosing to voluntarily disclose any noncompliance identified as a result of a voluntary self-evaluation to the appropriate regulatory agency now know the Colorado Department of Public Health and the Environment (the "Department") cannot assess administrative, civil or criminal negligence penalties as a result of that disclosure. They also know that as a result of the disclosure they must correct any noncompliance within two years. As a result of the voluntary disclosure, the Department will have input and oversight into how the noncompliance is corrected, and the noncompliance is addressed earlier than it might otherwise have been. In addition, voluntarily disclosed information alerts the regulatory agency to an issue that it may never have discovered on its own. As a result, the environment benefits by the voluntary disclosure. CACI believes this same protection, as embodied in H.R. 1047, is necessary at the federal level as well.

Increased Environmental Compliance

With adequate protections and incentives, companies will be encouraged to evaluate their environmental compliance as opposed to simply waiting for EPA or a state regulatory agency to conduct an investigation or to pursue an enforcement action against them. It is unlikely there would ever be enough enforcement officers to identify each and every area of noncompliance at a facility. Even an inspector can fail to identify every area of noncompliance during an inspection. As a result, companies performing a voluntary self-evaluation will have the time and ability to more thoroughly determine their compliance with environmental laws. H.R. 1047 then requires the company to come into compliance in order to benefit from the privilege and the penalty immunity.

Importantly, Colorado's law, as well as H.R. 1047, provides incentives to comply without affecting any enforcement authorities. For example, the bill does not relieve companies of the obligation to comply with the reporting and record keeping requirements of existing law. H.R. 1047 does not protect environmental audits made for fraudulent purposes. It does not prevent EPA from using information obtained independent of the audit. Finally, it does not create immunity for voluntary disclosures made by "bad actors." In other words, EPA retains all of its enforcement authorities against non-complying companies.

Companies Do Not Trust Regulatory Agencies

EPA's Interim Policy Statement on Voluntary Environmental Self-Policing and Self-Disclosure ("Interim Policy Statement") dated April 3, 1995, 60 Fed. Reg. 16875, provides some guidance as to when EPA intends to assess punitive penalties from a company that voluntarily discloses. However, this Interim Policy Statement is so fraught with uncertainty, qualifications, exceptions and limitations that it actually provides no assurance that punitive penalties won't be assessed by EPA. The bottom line is that companies fear the potential punitive actions of regulatory agencies and particularly EPA.

The Colorado Pollution Prevention Partnership, which is an organization with representatives from industry, environmental groups, EPA Region VIII and the De-

partment; conducted a survey of Colorado's small and mid-size businesses. The survey, published in June 1994, summarized that the "results indicated a strongly antagonistic attitude toward the government." When asked if the government was a good place to go for help, the response was "that the EPA was not interested in helping companies be less environmentally damaging; and that environmental agencies were more interested in fining the companies they regulated." Pollution Prevention Practices and Attitudes, page 31. The survey also identified several barriers to the widespread adoption of pollution prevention.

> A second and more serious barrier was the antagonistic relationship that was exposed between small business and the government. Attitudes toward government and government regulation were uniformly negative. Some respondents said that when they asked the government for help on an existing problem, the government would inspect their site and fine them for the very problem they had asked the government to help them solve. [Pollution Prevention Practices and Attitudes, page 38.]

These fears are not unjustified. There are many examples of responsible companies being assessed penalties for trying to improve their environmental performance. One Colorado company has had an experience where EPA, after including a 25% penalty reduction, assessed a penalty of $196,000 for reporting paperwork discrepancies that were discovered as a result of a voluntary self-evaluation and were immediately corrected. It is highly unlikely EPA would ever have discovered this problem on its own. Perhaps the most troublesome example involved a Colorado company that performed a voluntary study that was not required by law, kept the Department informed throughout the study and provided detailed results of the study to the Department. What the voluntary study found was that EPA guidance documents grossly underestimated air emissions from the types of facilities operated by the company. For identifying sources that had been missed by every regulatory agency for similar facilities across the country, the company was "rewarded" with the assessment of a $1,000,000 penalty, which included a 40% reduction. Companies clearly have reason to fear punitive actions by regulatory agencies.

Innovative Approaches Should Be Encouraged

It is time to initiate innovative ways to encourage environmental compliance. The historic "command and control" approach used by EPA and the states needs to be supplemented with an incentive-based approach. It is time for EPA to recognize that additional methods, such as carefully drawn environmental audit privileges and penalty immunity for voluntary disclosures, are necessary to achieve environmental compliance. It is time for EPA and other states to recognize that most companies are trying to comply with environmental laws and regulations because they want to be good corporate citizens, not because EPA or the state can assess fines or penalties. And, it is time to create a relationship of trust, respect and understanding between industry, EPA and the states. Legislation such as H.R. 1047 provides the necessary incentives and protections for companies to achieve even greater levels of compliance with environmental laws and regulations.

NEBD FOR FEDERAL LEGISLATION

States' Rights

While environmental audit privilege and voluntary disclosure laws have received enthusiastic legislative support with passage of laws in 14 states[1] within the last two and a half years, EPA remains adamantly opposed to privilege laws. Obviously states are empowered under the Tenth Amendment to the United States Constitution to enact their own laws. However, EPA can effectively prohibit the implementation of these laws. EPA has stated on numerous occasions that it will take separate enforcement actions in states with privilege or voluntary disclosure laws, thereby eliminating the benefit of these laws to compliance efforts in that state.

This fear of EPA overfiling is not hypothetical. EPA has attempted to kill these bills in a number of states as demonstrated by the attached letters to the State of Virginia, and in Colorado even wrote a letter to Governor Romer asking him to veto Senate Bill 94–139. EPA's efforts, however, are not limited to the legislative arena. In addition to threatening statements in the June 20, 1994 notice of the July public meeting soliciting comments on its 1986 Audit Policy, EPA asked the four states that had laws at the time to provide "documentary justification" for the passage of their laws. In addition, the Interim Policy Statement contains threatening language

[1]Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming.

to states with privilege/immunity laws. Specifically, the Federal Register notice states "EPA will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining" certain information and facts related to violations and criminal liability. 60 Fed. Reg. 16878.

In addition, once states have passed privilege/immunity laws, state approval of federally delegated programs typically contain threatening language regarding approval of the state program pending EPA's evaluation of that state's privilege/immunity law. EPA conditionally approved Colorado's air permitting program but included the following language in its approval. "If, during program implementation, EPA determines that this provision [referring to SB 94–139] interferes with Colorado's enforcement responsibilities under part 70, EPA will consider this grounds for withdrawing program approval in accordance with 40 CFR Section 70.10(c)." Utah also received EPA's admonition for passage of its privilege law in the approval of its air permit program which included similar language.

Unfortunately, these threats are having a detrimental impact. While Colorado has had some success with companies coming forward and voluntarily disclosing instances of non-compliance to the Department, the threat of EPA overfiling is a constant fear for most companies considering utilizing Colorado's law. Certainly, the large companies in Colorado are not willing to come forward to voluntarily disclose for fear of being the "test case." Because these threats are having an impact, federal legislation is imperative so that states can feel free to pass and implement laws they believe are effective in improving environmental compliance in their states.

Companies Favor Legislation

Price Waterhouse LLP recently published *The Voluntary Environmental Audit Survey of U.S. Business,* dated March 1995. This survey was sponsored by the Coalition for Improved Environmental Audits, the Compliance Management and Policy Group, the Environmental Auditing Roundtable, and several companies. Three hundred sixty-nine large companies participated in the survey, covering a broad sector of industries. Some of the key findings of the survey include:

1. 64% of the respondents stated they would be encouraged to perform more audits if an enforcement policy eliminated penalties for self-identified, reported and corrected violations.
2. 49% of the respondents stated they would be encouraged to perform more audits if there were a federal privilege law in effect, and 42% if there were a state privilege law in effect.
3. Only 24% of the companies said they would be more encouraged to conduct audits if EPA issued a formal, definitive, and specific auditing guideline and protocol.

This survey demonstrates the need for federal legislation in order to encourage companies to voluntarily audit their facilities, identify problems, correct those problems and voluntarily disclose that information to the appropriate regulatory agency. Approximately 50% of these companies identified the need for federal legislation to encourage more auditing. While some companies felt that a formal, definitive specific EPA guidance or policy document may be helpful, EPA's Interim Policy Statement is far from a definitive, formal guidance document. Attached are CACI's comments regarding EPA's Interim Policy Statement.

STATUS OF COLORADO'S LAW

There have been at least six companies that have voluntarily disclosed under Colorado's law. While CACI believes this is a significant step in the right direction, that number would be even greater if it were not for threats made by EPA regarding overfiling and separate enforcement actions in states with laws such as Colorado's. Colorado has attracted particular interest from EPA, and as a result, there is heightened sensitivity by Colorado companies. Articles such as the attached which appeared in the *Rocky Mountain News* on July 28, 1994 have helped foster this sensitivity.

In spite of the publicity, a number of companies have stepped forward to voluntarily disclose. These disclosures are of the types of violations that CACI expected would be disclosed as a result of this law. One involved an industrial boiler that had not been properly permitted. An initial meeting was held with the Department on October 7, 1994 and the entire matter was resolved by January 5, 1995. There have been several instances of acetone being disposed in sanitary sewers, practices that have since been discontinued. Possible past disposal of small amounts of solvent to the ground was also voluntarily disclosed. Based on investigatory work done by the facility, no evidence of a release was found at the site. Another disclosure

relates to significant increases and decreases of emissions that may have occurred over the past several years, possibly requiring a construction permit. All of these violations were found as a result of voluntary audits.

The environment in Colorado has benefited by allowing these companies to voluntarily disclose instances of noncompliance, work cooperatively with the Department to resolve the problems, and obtain the appropriate permits or discontinue the inappropriate activities without fear of fines or penalties. CACI believes it is likely these instances would not have been discovered by the Department, the Department would not have been aware of these issues, and the corrections would possibly not have been implemented, without the protection of Colorado's environmental audit privilege and voluntary disclosure law. However, to gain even greater benefits, a federal law such as H.R. 1047 is necessary.

OPPONENT'S RHETORIC AGAINST PRIVILEGE LAWS

Privilege Laws Are an Impediment to Enforcement

A common complaint about audit privilege laws by EPA, Department of Justice, some District Attorneys, some Attorneys General and environmental groups is that the lack of access to the audit report will hinder prosecution of environmental violations. This is simply untrue.

While H.R. 1047 does provide a privilege for certain environmental audit reports, it is a qualified privilege. If a prosecutor demonstrates the self-evaluation was done fraudulently to avoid criminal prosecution, that audit report is not privileged. If a citizen or environmental group believes there is information in the audit report relevant to a threat to human health or the environment, a judge can determine there is a compelling circumstance and allow the group access to the audit report. In other words, H.R. 1047 identifies the appropriate scenarios when access to the information should be provided and the privilege is disallowed.

Further, H.R. 1047 creates a privilege only for those documents meeting the definition of a voluntary self-evaluation which is a document created as a result of evaluating the company's environmental compliance. The privilege does not extend to documents required to be maintained by law, documents or information required to be reported by law, information discovered as a result of a typical enforcement action, or information learned from an independent source. Therefore, all of the currently existing mechanisms that are available to prosecutors, regulators and environmental groups are still available under H.R. 1047. It is difficult to understand how the creation of a privilege for documents that either are not routinely utilized by enforcement officials or that do not exist for fear that the information will be used against the company, changes the existing enforcement picture. EPA appears to be having no problem increasing the number of enforcement actions as well as the amount of penalties with its current authorities.

Economic Benefit Penalties Are Not Appropriate for Voluntary Disclosures

CACI does not believe that EPA should be able to recover economic benefit penalties from companies that voluntarily disclose under laws such as H.R. 1047. Such penalties are inconsistent with the policy that supports voluntary disclosure as well as the policies that justify collection of the penalties themselves. However, EPA's Interim Policy Statement requires the assessment of economic benefit penalties.

The theory behind economic benefit penalties is to recapture the economic value that a facility receives from delaying compliance with environmental regulation. See e.g., 42 U.S.C. 7420(d) (economic benefit penalties under the Clean Air Act). EPA's stated goal in accessing economic benefit penalties is to negate a company's incentive to avoid compliance.

The goal of negating an economic incentive to avoid compliance is not relevant in cases of voluntary disclosure. Regulated entities that perform voluntary self-evaluations and then disclose their audits have clearly made a commitment to achieve compliance regardless of the cost. In performing the audit, a regulated entity incurs significant costs to identify areas of non-compliance. By voluntarily disclosing instances of noncompliance, it is stepping forward to work with regulators and, in doing so, is committing itself to funding what can be a very expensive effort to correct deficiencies. The relatively short period of time provided by H.R. 1047 to achieve compliance is likely to drive costs even higher. If an entity's intention is to protect its cash flow, it would avoid doing the audit in the first place.

It is important to remember that H.R. 1047 requires a company to discover the non-compliance through an environmental audit. The entity cannot have known about the violation and then voluntarily disclosed the non-compliance. Since the company cannot have prior knowledge of its non-compliance, and was therefore un-

aware of any potential economic benefit, the punitive rationale regarding such penalties is not applicable to a voluntary disclosure under H.R. 1047.

Tossing a company making a good faith effort to cooperate and achieve compliance into the quagmire of economic benefit calculations defeats the whole purpose of H.R. 1047. It turns a new and innovative process that is intended to focus on environmental quality into contentious negotiations that, based on past experience, could drag on for a year or more. This creates the very uncertainty that discourages companies from conducting voluntary self-evaluations and voluntarily disclosing the results.

A look at EPA's efforts to turn the theory behind economic benefit penalties into practice supports this important concern. The BEN model that was developed by EPA to calculate economic benefit penalties is widely acknowledged to be flawed and has been the subject of a great deal of criticism and litigation. The American Automobile Manufacturers Association, American Forest and Paper Association, Chamber of Commerce of the United States, Chemical Manufacturers Association and National Association of Manufacturers filed a petition for rulemaking on October 25, 1994 concerning the use of the BEN Model in the recovery of economic benefit penalties in EPA enforcement proceedings. ("Rulemaking Petition"). Their Rulemaking Petition provides documentation that the "flaws in the BEN Model can substantially distort the penalties assessed in individual cases." The petition argues that the "discount rates used in the BEN Model can arbitrarily double the economic benefit computation." Rulemaking Petition, page 3. More specifically, the Rulemaking Petition states "the BEN Model has been faulted for the use of economically unjustified cost of capital rates to compound past savings forward, for the use of unsupported cost of capital rates for discounting cash flows and for its failure to reflect accurately changes in the tax laws." Rulemaking Petition, page 10. Additional concerns raised in the Rulemaking Petition relate to EPA's increasing pressure on states to use the BEN Model and the increased litigation that will inevitably result from use of this model.

Because H.R. 1047 frees regulated entities from the fear of economic benefit penalties after voluntary disclosure, it encourages these companies to investigate their operations and make voluntary disclosures of noncompliance. At the same time, H.R. 1047 does not shelter companies seeking a competitive advantage by failing to comply with the law. EPA can reach these recalcitrant companies through traditional enforcement measures that are available. Moreover, under H.R. 1047, the immunity is lost unless the company discloses and corrects the noncompliance upon its discovery often a costly proposition. It does not protect a company that is aware it is operating out of compliance for a long period of time in order to gain a competitive edge. This is particularly true when the cost of coming into compliance within a relatively short period of time as required under H.R. 1047 may be more expensive than any economic benefit gained by being out of compliance. As a result, economic benefit penalties are inappropriate under the voluntary disclosure immunity concept; they will only discourage companies from voluntarily complying with the law.

The Litigation Costs Will Not Affect Any Agency Enforcement Efforts

Representatives from EPA and state enforcement agencies frequently assert privilege laws will greatly increase transaction costs for enforcement since they apparently believe privilege statutes will require the expenditure of considerable resources to litigate whether a piece of information is subject to the audit privilege or disclosure immunity. CACI respectfully disagrees with this view.

In expounding this view, the agency representatives attempt to have their enforcement cake and eat it too. They claim that they typically do not seek environmental audits or use voluntarily disclosed information in enforcement proceedings, but that enforcement would be devastated by audit privilege/immunity transaction costs. If these representatives truly have no "interest" in audits or voluntarily disclosed information, their enforcement activities would be based on other, readily available information; they should be able to proceed without incurring any additional transaction costs. Perhaps the agencies' concerns about transaction costs are indicative of their desire to obtain audits in enforcement after all. Perhaps these concerns demonstrate the need for laws like H.R. 1047.

In addition, EPA's view of transaction cost is too narrow. It focuses on the transaction costs associated with an individual case that has already moved well into the enforcement stage. Self-evaluation privilege and voluntary disclosure laws, however, encourage every company to cooperate rather than litigate with the environmental agencies. The laws will achieve greater overall compliance while causing the enforcing agency to incur much lower transaction costs than traditional enforcement. If EPA would examine the transaction costs associated with achieving environmental

compliance for the entire regulated community, it would find that the small potential increase in transaction costs in an individual case is far outweighed by the decrease in transaction costs in the multitude of cases that, because of laws like H.R. 1047, will be quickly and cooperatively resolved.

CONCLUSION

At least fourteen states have determined environmental audit privilege and/or voluntary disclosure laws are an important tool to increase environmental quality and compliance in their states. However, for these states to effectively implement their laws, federal legislation like H.R. 1047 is imperative. Without H.R. 1047, EPA will continue to intimidate and threaten these states, essentially eliminating the benefits of their laws. CACI urges you to report this bill favorably to the full committee so that it may be moved quickly to the floor for consideration by the full House. Passage of H.R. 1047 is required to provide these much needed incentives and protections at the federal level.

EPA rejects Colorado's new law

RMN 28 55A - Business 7/28/94

Federal agency to ignore state's amnesty policy for businesses

By John Brinkley
Rocky Mountain News Washington Bureau

WASHINGTON — The Environmental Protection Agency said Wednesday that it will not be bound by a new Colorado law that insulates businesses from fines and penalties for environmental wrongdoing.

After hearing a representative of the Colorado Association of Commerce and Industry defend the law at a public hearing, EPA official Steven Herman said his agency can ignore the law and take its own enforcement actions.

"We can take independent enforcement action," he said. "It's not what we want to do. One of our highest priorities is to work with the states."

The law, enacted on June 1, allows Colorado businesses to conduct environmental audits on themselves and keep the results secret. It also allows them to disclose their audit results to the state without danger of being fined or otherwise penalized for environmental wrongs discovered in the audits.

Colorado is one of four states that have such laws, but is the only one whose law provides amnesty to businesses that voluntarily disclose their audit results to the state.

The EPA doesn't like the laws, "principally because of the risk of weakening state enforcement programs, the imposition of unnecessary transaction costs and delays in enforcement actions, and the potential increase in the number of situations requiring the expenditure of scarce agency resources," the agency said in a Federal Register notice.

Cynthia Goldman, a Denver lawyer representing CACI, said the law was necessary because businesses were loathe to work with government out of "fear of enforcement."

She told the government panel that a survey of Colorado businesses had uncovered "a strongly antagonistic attitude toward the government" because environmental agencies were primarily interested in issuing fines.

It found that businesses, on the other hand, were primarily interested in striving "to do the right thing" and "to be a good citizen," she said.

Goldman said the law, which she wrote, had a number of protections against bad faith, as well as a stipulation that any business that voluntarily discloses its audit findings to the state has two years to fix whatever problems it has found. After that, it is fully exposed to fines and penalties, although not retroactively.

She also said either the state or the federal government could still undertake its own enforcement actions using evidence gathered separately from a company's audit.

David Gallogly of the Pennsylvania Department of Environmental Resources said such laws "could be used by the irresponsible" to find environmental problems and not fix them.

Also, the fear that regulatory agencies would use businesses' environmental audits to levy fines, "has never materialized, at least not in Pennsylvania," he said.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB - 3 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Peter W. Schmidt
Director
Department of Environmental Quality
629 East Main St.
Richmond, VA 23219

Dear Mr. Schmidt:

I am writing to express EPA's opposition to the environmental privilege/immunity legislation that is currently under consideration in Virginia (House Bill 1845). Our concerns include the following:

1. The bill appears to immunize criminal conduct and could therefore frustrate legitimate efforts to detect and appropriately punish reckless and intentional acts that often result in severe harm to people or the environment.

2. The bill would encourage increased litigation, further burdening our already taxed judicial system. Increased litigation should be expected, for example, over efforts to use the law to shield information associated with non-discrete, routine activities that are characterized as "compliance evaluations" simply to evade disclosure. This kind of litigation will drain government and private resources and in some cases prevent quick action to address serious environmental emergencies, despite the exception for emergencies.

3. The bill contains overly broad definitions of key terms, such as "environmental assessment" and "document." As a result, this audit privilege, unlike any other privilege (e.g., the attorney-client and work product privileges), appears to protect the facts underlying protected documents -- facts that may be crucial in holding polluters accountable for their actions.

4. Although incentives for voluntary disclosure are a good idea, the penalty immunity provision in the proposed legislation will "unlevel the playing field" by

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allowing violators to keep the economic benefit they gained through noncompliance, working to the disadvantage of their law-abiding competitors.

As you may know, Administrator Browner asked the Office of Enforcement and Compliance Assurance last May to reassess EPA's environmental auditing policy to see if we needed new incentives to encourage voluntary disclosures and prompt correction of violations uncovered in environmental audits. Attached are copies of correspondence between the U.S. Congress and Administrator Browner describing our inclusive reassessment process. As the letters indicate, we plan to complete our reassessment in the very near future.

On January 19-20, we held a series of meetings in San Francisco in which EPA presented options to a focus group that included representatives from industry, state environmental commissions and attorneys general's offices, district attorneys' offices and environmental groups. We did not seek or expect consensus from the group. Nonetheless, we heard support from all the interests represented at the meeting -- including industry -- for a national policy based on penalty mitigation for violations that are voluntarily disclosed and promptly corrected.

If Virginia constrains its enforcement efforts through this legislation, we foresee the need emerging for increased federal enforcement in your State, particularly in circumstances in which application of the proposed law leaves a crime or serious violation unpunished or a significant violator with a large economic benefit; the law is used to shield information associated with routine compliance monitoring activities that are characterized as "compliance evaluations" simply to evade disclosure; or the law is applied in a way that shields violations that are not promptly corrected.

My staff has raised these concerns with your Enforcement Director, Harry Kelso, and we remain available to discuss these issues more fully. I strongly urge Virginia not to enact the above-referenced audit privilege/immunity legislation. In my view, it will do more harm than good.

Sincerely yours,

Steven A. Herman
Assistant Administrator

1776 Lincoln St., Suite 1200
Denver, CO 80203-1029
FAX (303) 860-1439
Phone: (303) 831-7411

Colorado Association of
Commerce and Industry

June 2, 1995

VIA FEDERAL EXPRESS

Mr. Steven A. Herman
c/o Docket Clerk
U.S. EPA Air Docket
Mail Code 6102
401 M Street, SW
Washington, D.C. 20460
Attention: Docket No. C-94-01

Re: CACI's Comments on EPA Interim Policy Statement

Dear Mr. Herman:

The Colorado Association of Commerce and Industry ("CACI") appreciates the opportunity to comment on the Environmental Protection Agency's ("EPA" or the "Agency") Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement ("Interim Policy Statement" or the "Statement") dated April 3, 1995. 60 Fed. Reg. 16875. CACI is Colorado's primary business trade association and has approximately 1,500 business members, 80% of which have 100 or fewer employees. As you know, CACI has been an active participant in EPA's environmental audit policy review process since Colorado was among the first states to pass an audit privilege law and was the first to provide penalty immunity for certain voluntary disclosures of environmental violations. CACI submitted written comments to EPA on July 27, 1994 and August 10, 1994 discussing the Colorado privilege/immunity statute and providing input during the formulation of the Interim Policy Statement. CACI also asked me to represent it on the "State panel" at EPA's hearing regarding the 1986 audit policy held on July 27, 1994, and I participated on its behalf in Agency discussions on October 6, 1994.

CACI was specifically not invited to EPA's January 1995 meeting in San Francisco. Yet, based on that meeting, EPA has made bold statements about industry's position on privilege/immunity laws, particularly regarding penalty mitigation, that CACI does not believe represent the views of Colorado business. Had EPA invited CACI to attend the January 1995 meeting (as we requested), EPA would have

heard the concerns of industry representatives who have translated their concerns into legislative action. Moreover, by excluding CACI, EPA has created the impression that industry representatives were hand-picked to muffle the opposition, further fueling mistrust of the Agency policy.

While CACI is pleased that EPA recognizes the need to encourage voluntary compliance with environmental laws, this Interim Policy Statement will not accomplish EPA's goal. Contrary to EPA's assertions that the Interim Policy Statement sets forth "specific" conditions for leniency in the assessment of fines or penalties and provides "certainty" regarding the results of voluntary disclosures, the policy is fraught with vague terms, qualifications, and a significant limitation on use. As a result, the Interim Policy Statement fails to meet EPA's stated purpose of providing greater certainty for regulated entities that voluntarily disclose their non-compliance to EPA. Unlike audit privilege and disclosure immunity statutes, this policy will do little to encourage increased compliance with environmental laws and protection of the environment.

It is ludicrous for EPA to assert this Interim Policy Statement provides any certainty to regulated entities when the Statement itself includes an extremely broad - "limitation-on-use" provision. That provision states "EPA officials may decide to follow the guidance provided in this interim policy or to act at variance with the guidance based on analysis of case-specific facts and circumstances. Application of this policy to the facts of any individual case is at the sole discretion of EPA and is not subject to review by any court." 60 Fed. Reg. 15879. The final sentence in the interim policy statement closes with the admonition that "EPA reserves the right to change this interim policy at any time without public notice." 60 Fed. Reg. 15879. Essentially, EPA has stated that no entity should rely on this Interim Policy Statement for any purpose.

CACI has significant concerns about many statements, conclusions and issues discussed in this Interim Policy Statement; however, our comments are focused on EPA's preference for its policy over "broad" environmental privileges and immunities and consequences for states that have passed privilege and immunity laws.

Mr. Steven A. Herman
June 2, 1995
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EPA's POLICY DISFAVORS PRIVILEGE
LEGISLATION WITHOUT JUSTIFICATION

Commentors at the July 27 and 28, 1994 public hearing consistently stated that regulated entities do not trust regulatory agencies, and EPA in particular, regarding the consequences of voluntarily reporting instances of non-compliance. This is especially true of small to medium sized companies. CACI's July 27, 1994 comments reference a study conducted by the Pollution Prevention Partnership, of which EPA Region VIII is a member, that provides empirical data regarding this point. However, ignoring this and other evidence developed during the public hearing, EPA has inappropriately focused its policy on "incentives" for large companies that are already likely to conduct environmental audits. EPA has not provided the assurances and certainty necessary for small to medium sized businesses to perform environmental audits and then seek help with any problems they identify. In spite of the comments received in July 1994 regarding this distrust, EPA states a preference for its policy over a privilege in order to not "create an atmosphere of distrust between regulators, industry and local communities" (emphasis added). 60 Fed. Reg. 16878. EPA has missed the point - this distrust already exists. Laws such as Colorado's are intended to create a more cooperative relationship between industry and regulators by protecting environmental audits under specific conditions and providing certainty regarding the results of voluntary disclosures.

In defending its position favoring the Statement over any privilege, EPA has identified highly theoretical and legalistic arguments against a privilege, the most absurd of which is that through the Interim Policy Statement EPA has addressed the concern of entities wanting to reduce their exposure by conducting self evaluations. This policy does not even remotely address that concern. In fact, the policy raises additional concerns including exposure for mandatory economic benefit penalties, individual criminal liability and use of an audit report.

Economic Benefit Penalties. For instance, EPA has retained the ability to assess economic benefit penalties, even if all of the "conditions" are met, but has provided no

guidance as to how those penalties will be assessed. The BEN Model that has been used by EPA in the past is widely acknowledged to be flawed and has been the subject of a great deal of criticism and litigation.

The American Automobile Manufacturers Association, American Forest and Paper Association, Chamber of Commerce of the United States, Chemical Manufacturers Association and National Association of Manufacturers filed a petition for rulemaking on October 25, 1994 concerning the use of the BEN Model in the recovery of economic benefit penalties in EPA enforcement proceedings. ("Rulemaking Petition"). Their Rulemaking Petition provides documentation that the "flaws in the BEN Model can substantially distort the penalties assessed in individual cases." The petition argues that the "discount rates used in the BEN Model can arbitrarily double the economic benefit computation." Rulemaking Petition, page 3. More specifically, the Rulemaking Petition states "the BEN Model has been faulted for the use of economically unjustified cost of capital rates to compound past savings forward, for the use of unsupported cost of capital rates for discounting cash flows and for its failure to reflect accurately changes in the tax laws." Rulemaking Petition, page 10. Additional concerns raised in the Rulemaking Petition relate to EPA's increasing pressure on states to use the BEN Model and the increased litigation that will inevitably result from use of this model.

Not only is there a great deal of concern related to the BEN Model, it is virtually impossible for a regulated entity to calculate the economic benefit penalty to be assessed with any confidence. As a result, the economic benefit penalty is often arbitrary and more of a "gravity" based penalty than EPA is willing to admit. In addition, there is no guidance as to what might be considered an "insignificant amount" under the Interim Policy Statement, in which case EPA may, at its discretion, forgive a penalty. Further, EPA states that recovering the economic benefit was recommended by a broad spectrum of commentors, including industry. This is clearly not the position of CACI, as reflected in our August 10, 1994 comment letter, and had CACI been invited to attend the January 19, 1995 meeting, EPA would have been aware this is far from a consensus industry position.

Finally, the concept of deterring non-compliance with environmental laws by imposing economic benefit penalties is inconsistent with penalty immunity laws such as Colorado's. A company cannot knowingly violate the law and receive penalty immunity, and therefore the penalty does not deter undesirable behavior - it simply discourages companies from conducting audits and reporting those results. CACI's August 10, 1994 comment letter provides additional discussion regarding why economic benefit penalties are inappropriate to encourage voluntary disclosures.

Individual Criminal Prosecution. The Interim Policy Statement provides some "protection" from criminal prosecution of a company but provides no such relief for criminal prosecution of an individual. As a result, this policy will discourage effective environmental auditing. Regulated entities must rely on individuals to provide pertinent information regarding the status of compliance with environmental laws. However, if that individual may be subject to criminal liability as a result of participating in the audit, it is unlikely that individual will be as forthcoming as they might otherwise be if protected under a privilege. While EPA has considered the company's criminal exposure (although it applies only to EPA, not the Department of Justice), the Interim Policy Statement increases the concern regarding an individual's criminal exposure. This is extremely detrimental to comprehensive and honest auditing. Privilege laws, such as Colorado's, appropriately address the exposure of both the company and the individual.

Use of the Audit and Other Issues. A few additional concerns relate to mitigating penalties and requiring cooperation with EPA. Mitigation of penalties does not provide certainty as to the results of conducting a voluntary self evaluation and disclosing that information to the Agency. Since a reduction of even 75% of the gravity-component of a penalty based on $25,000 per day per violation can still be significant, this aspect of the Statement does not provide the certainty required to encourage voluntary disclosures. Even with the "gravity" component reductions described in the policy, a company could still be subject to substantial penalties (gravity and economic benefit), thus discouraging an entity from auditing or reporting. Further, one of the

conditions in the Interim Policy Statement is that a regulated entity must "cooperate as required by EPA." Cooperation with EPA includes providing all requested documents, access to employees and assistance in any further investigations into the violations. This certainly gives EPA wide discretion for abuse, does not engender trust and creates significant exposure to a regulated entity.

Finally, EPA's policy protects the audit report only to the extent that it will not be used to "trigger" an investigation. Therefore, EPA could obtain an audit at any time after an investigation has already been "triggered." Clearly, EPA has created an exception that swallows almost all of the limited audit protection provided in the Interim Policy Statement. For EPA to unqualifiedly compare this Interim Policy Statement to the protections and incentives provided by a privilege or immunity demonstrates a fundamental misunderstanding of such laws.

HARSH CONSEQUENCES FOR STATES

EPA has a threatening message to states that have already passed privilege and immunity laws, such as Colorado. EPA's rationale for this threat is its perceived obligation to establish a certain minimum consistency in federal enforcement. In order to maintain this consistency, EPA has determined it must penalize and initiate separate enforcement actions against entities that voluntarily disclose instances of non-compliance in states with privilege and immunity laws. The logic of this position is elusive at best since Colorado, as well as the other twelve states, with privilege and immunity laws are still able to undertake appropriate enforcement actions as determined by their legislatures. It appears that because EPA disagrees with these state legislatures, it is threatening to negate the effect of these laws in the name of consistency.

In addition, EPA identifies five conditions under which it believes overfiling is appropriate in states with privilege and immunity laws. Certainly in the case of Colorado, its audit privilege/voluntary disclosure law does not "prevent" the state from obtaining the information identified by EPA. Colorado's law provides a privilege for an environmental audit report under certain, qualified

circumstances. There are a number of exceptions to the privilege, including compelling circumstances, as determined by a judge, which enables the state or a private party to obtain the environmental audit report. Also, correction of any problem is required in order for the privilege to apply. In addition, the voluntary disclosure immunity applies only to entities that correct any violations identified as a result of the audit and does not apply to "bad actors" or to intentional, reckless, or willful criminal acts. CACI does not believe that Colorado's law prevents the state from obtaining any of the information identified in the Interim Policy Statement, although it may have to be obtained from a source other than an audit, and as a result, scrutinizing enforcement actions in Colorado by EPA will not be necessary.

In closing, while EPA has taken some steps to reduce penalties as a result of a voluntary disclosure by a regulated entity, it has set standards that are virtually impossible for the majority of American businesses to attain and has made it impossible to determine what penalties might be assessed. This Interim Policy Statement offers no certainty to entities voluntarily disclosing instances of non-compliance with environmental laws. CACI was hopeful EPA would recognize the benefits provided by laws such as Colorado's, and would at least allow Colorado the opportunity to implement its law - without interference from EPA. Unfortunately, it appears EPA intends to threaten increased enforcement in states with privilege and immunity laws, in spite of the fact that the number of states with such laws is increasing at a rapid pace.

This Interim Policy Statement provides no certainty to regulated entities regarding EPA's use of audits and voluntary disclosures and demonstrates the need for federal environmental audit privilege and voluntary disclosure legislation such as the bills introduced by Senators Hatfield and Brown and Congressman Hefley. CACI encourages EPA to reconsider its Interim Policy Statement and to support a privilege for audit reports and to provide immunity from penalties for voluntary disclosures of non-compliance. If EPA will not support an environmental audit privilege and voluntary disclosure immunity, it should at the very least, take no action in states with such laws until there has been adequate time to evaluate the effectiveness of these laws. CACI appreciates the opportunity to comment on EPA's Interim Policy Statement.

Please feel free to call me at 303-298-5768 if you have any questions regarding these comments.

Very truly yours,

Cynthia L. Goldman

Cynthia L. Goldman

cc: Senator Hank Brown
Senator Mark Hatfield
Congressman Joel Hefley
Ms. Carol Browner
Governor Roy Romer
Attorney General Gale Norton
State Senator Al Meiklejohn
Ms. Patti Shwayder, Acting Executive Director
Colorado Department of Public Health
and Environment
Frank P. Prager, Esq.
Mr. Stan Dempsey

CLG/lh

Mr. GEKAS. Mr. Rathbun, I take it that Kansas does not have a statute; is that correct?

Mr. RATHBUN. In fact, it was just passed this last session.

Mr. GEKAS. It did?

Mr. RATHBUN. It just came—for the first time, it came before the Kansas Legislature. It passed this last session.

Mr. GEKAS. Are you working for its repeal?

Mr. RATHBUN. I don't think that is my job, frankly.

Mr. GEKAS. Do you want us to do something about that?

Mr. RATHBUN. I——

Mr. GEKAS. Do you want us to refrain from applying it federally?

Mr. RATHBUN. What I am saying is, it makes my job so much harder if I have to comply with this bill in terms of all the immunity provisions; and so I just—I am just simply looking at the job that you asked me to do and asking you not to tie my hands when I do it.

Mr. GEKAS. Does the attorney general of Kansas find that his hands are tied in enforcing Kansas's law?

Mr. RATHBUN. Unfortunately, Kansas doesn't have State environmental laws of any moment. They have some very basic nuisance laws, but the Federal laws that actually control are the ones that are actually used in Kansas. In fact, I am not aware of any environmental cases being brought by a Kansas attorney general in the last dozen years or so.

Ms. SCHIFFER. Mr. Gekas, if I may also add to that, the real design of our Federal environmental laws is to provide a Federal minimum of environmental protection for all Americans and to be sure that people, regardless of what State they live in, have clean air and clean water and clean land; and they, in fact, over the past 25 years, have been extremely successful in getting us moving in the direction of those results. So one of the important features of not having an audit privilege or an immunity requirement at the Federal level is that the people in the State of Kansas will get the same environmental protection as the people in other States, where the people in your State will get the same environmental protection as people in other States, regardless of whether that State wants to enact a secrecy provision and an anti-enforcement provision such as this provision. That is why it is particularly important, in keeping with the idea of a standard that protects all of the American people, that we not enact legislation like H.R. 1047.

Mr. GEKAS. Wouldn't you agree that the same American people who want their environment protected also, in a mind of fairness, want to see companies come forth voluntarily to disclose, knowing that the remedy and the damage and so forth are not going to be used against them, thus stultifying the disclosure in the first place?

There is great support for that. Obviously there is.

Ms. SCHIFFER. We are very much in favor of voluntary compliance and encouraging companies to comply, and I think the information that has been developed shows quite clearly that big companies are doing environmental audits. All the people who testified before you from industry today indicate that they do do environmental audits, and what the studies show is encouraging them to do those audits is strong enforcement.

The best way they can be in compliance is to do environmental audits. After all, what we really want here is clean air and clean water through compliance. We don't want perfectly crafted audits. Audits are simply a tool to get there. And the policies that the Environmental Protection Agency and the Department of Justice now have take into account the situation where a company does a voluntary audit which is a good audit, corrects the violation, comes forward and makes disclosure of those facts. If companies do that, they will be unlikely targets for criminal investigation, much less prosecution. Their penalties will be adjusted accordingly.

And what we really look to for civil penalties in those circumstances is to recover economic benefit; that is the way in which they benefited against their competitors for not coming into compliance. But facts concerning voluntary compliance are certainly taken into account; and in fact, all the companies that sat here today told you that they have extensive environmental audit programs and they have those programs without having a Federal secrecy act.

Mr. GEKAS. But they want this legislation because of the added incentives and protection; isn't that so?

Ms. SCHIFFER. They tell you they want it, in order to encourage auditing, but we believe that it would have the effect of making us unable to enforce against them. Since it is really the fact of enforcement that is a significant part of what is encouraging them to do those audits, you would in fact be creating a disincentive for them to do the audits if this kind of legislation is passed, which makes enforcement so difficult. As Mr. Rathbun said, we would have to do enforcing with our hands tied behind our backs and blindfolded if this legislation passes.

Mr. GEKAS. It is an attractive feature to have the companies know that they can come forth immediately when some type of degradation occurs in the environment, knowing that their efforts to notify, their efforts to remedy and so forth are not going to be used against them. I think that is a valid tenet.

Mr. HERMAN. Mr. Chairman, could I address that for a second?

Mr. GEKAS. Yes.

Mr. HERMAN. Because I think what you are saying about their coming forward is absolutely right; and what we have tried to do in our policy is say that if you do come forward, if you do correct it voluntarily, you do correct—you are correcting the violation, there won't be penalties except—except in a couple—except in these instances.

[See EPA auditing policy information on p. 214.]

Mr. HERMAN. And I guess I would ask you, and the—I would ask the gentleman that testified before, I mean, do they think that there should be penalties in cases where we have actual—serious actual harm to human health and the environment?

Mr. GEKAS. Don't they assert that the tenets of the bill would still permit these to be prosecuted?

Mr. HERMAN. No.

Mr. GEKAS. Oh, I do. I don't read it that way.

Mr. HERMAN. I guess we read—we read the bill differently.

Mr. GEKAS. You also determined that you had submitted for review and recommendations to a body of all of the policy of the EPA

part of your opening statement; you said that. Did you also submit a copy of this bill for them to review? Didn't you say that you had arranged for a review of the policy itself?

Mr. HERMAN. Our policy is out. It was published in the Federal Register and it is being commented on now, yes. That is true. And the—I am sorry.

Mr. GEKAS. Did you solicit comment on the prospect of legislation like we have in front of us?

Mr. HERMAN. No, we did not on H.R. 1047, specifically. However, we generally solicited and received comment on all approaches, including an evidentiary audit privilege and penalty immunity.

Mr. GEKAS. Mr. Kelso, can you live with the Virginia statute?

Mr. KELSO. Yes, sir.

Mr. GEKAS. Mr. Ronald, it appears that you told me that the legislature passed——

Mr. RONALD. By a two-vote margin, and I would like to point out——

Mr. GEKAS. What if the Supreme Court has a 5-to-4 margin most of the time?

Mr. RONALD. I understand it still passed. But I want to point out to you why you are seeing what you are seeing in the States, and it is my belief, after talking with my counterparts in other States that have passed such legislation, that it is a reaction to environmental law that they essentially think doesn't protect the environment. They are not looking at the wisdom of the specific legislation; they just want to see these crazy environmental laws go away. And they are not thinking about whether it is a privilege that does it or whether it is fixing the laws that do it.

What I was trying to suggest to you is that if we fix the laws, we go a long way toward eliminating part of the problem. And one other thing I would just like to mention before you cut me off, or maybe you are not going to cut me off——

Mr. GEKAS. I will cut you off; don't worry.

Mr. RONALD [continuing]. You don't need privilege to keep them from using the information. The use of privilege is secrecy. You can make it inadmissible. You can simply say, it can't be introduced as evidence and still not go the privilege route if when you ask people that question, there isn't any response.

Why does it have to be secret and privileged? Why simply can't you make it not admissible? It is a different animal.

Mr. GEKAS. We will take that into consideration.

Mr. RONALD. Thank you, sir.

Mr. GEKAS. I wanted to point out to you in the veto message of your Governor, he seemed to support the theme of the legislation, but for some reason he didn't want this one to become law. He said, "let me assure you and the supporters of the bill that I will work closely with the legislators and drafters."

In other words, he favors also——

Mr. RONALD. The only part——

Mr. GEKAS. So I was saying, in your presentation you have the legislature voted by a two-vote margin and the Governor vetoed, as if, my gosh, nobody in your State is for it. They are all for it, he just vetoed it for different reasons.

Mr. RONALD. Mr. Chairman, if I may. The only part of the bill that was objectionable was the privilege aspect of the bill. That is the part we find troublesome.

The other part, as I tried to indicate, my boss, Attorney General Grant Woods, and the director of the Arizona Department of Environmental Quality, believed it was a step in the right direction, and it appeared to be very much in concert with the types of—the policy that the EPA promulgated on March 30.

Mr. GEKAS. Well, now the Chair's time has run out. But as a rhetorical question, what is the score now? How many States are for and against or pending? We said 14 and 11 and 3. Is that the figure?

Ms. Goldman, we will let you answer that, and we will end my time.

Ms. GOLDMAN. There are 14 States that currently have privilege and/or voluntary disclosure laws; there are another 11 that are considering it before their State legislatures at this time; and another 4 are expected to introduce bills later this year.

Mr. GEKAS. I thank the panel, and we will turn the microphone over to the gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman. Just a couple of quick points.

Could I request that the EPA's chart be made part of the record?

Mr. GEKAS. Without objection, so ordered.

Mr. REED. Thank you.

[The information follows:]

EPA AUDIT POLICY

(Effective April 18, 1995)

When violations are:

Discovered through voluntary audits or self-evaluations;

Voluntarily and promptly reported;

Corrected expeditiously, including remediation and prevention.

EPA will not:

Seek any penalty but may recover significant economic benefit realized from violations.

Recommend criminal charges against corporation.

EPA policy does not apply to:

Violations that result in imminent & substantial endangerment.

Violations that result in serious actual harm to human health or the environment.

Failure to prevent repeat or recurring violations.

Criminal conduct of individuals.

Actions by corporations that "conceal or condone" violations, demonstrate "conscious involvement" or "willful blindness."

Policy includes flexibility to reduce penalties where most (but not all) conditions are met.

SMALL BUSINESS COMPLIANCE POLICY

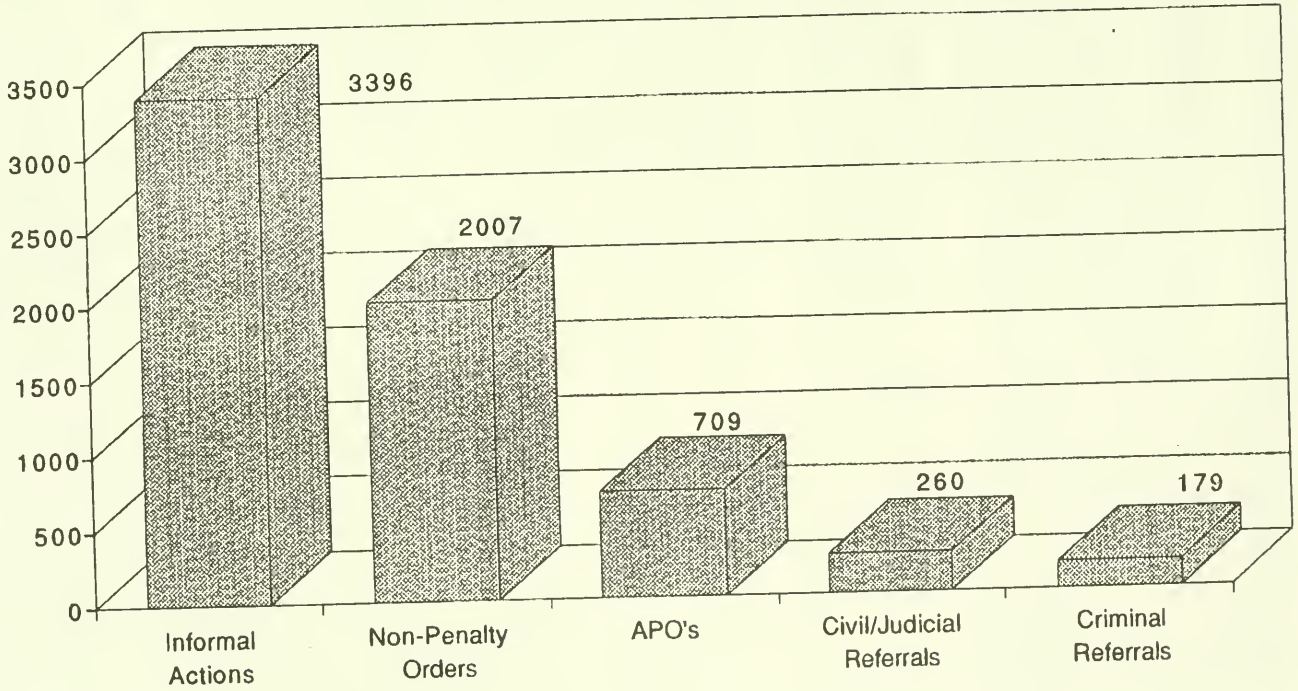
Companies with up to 100 employees will have: 180 days or 1 year using pollution prevention, to correct violations without enforcement action or penalty.

If violation discovered through voluntary compliance assistance program.

If more time needed to correct violation EPA will waive up to 100% of gravity component of penalty, but may seek economic benefit.

Subject to exceptions for: imminent and substantial endangerment; actual serious harm; significant health, safety, or environmental threat; repeat violations; and criminal conduct.

FY 1994 Enforcement Actions By Type



Mr. REED. Mr. Herman, you might want to respond to the previous dialog, but, also, you might want to respond to any specific policies you have with respect to small business.

Mr. HERMAN. I'm sorry?

Mr. REED. You might want to respond to the colloquy that went before, or, in addition, you might want to respond specifically to any small business policies EPA has specifically.

Mr. HERMAN. Right. Thank you, Mr. Reed.

First, we have taken several steps to address the specific problems of small business, and I would direct your attention to the board which we are putting up now. Just a couple of weeks ago I signed a policy called the Small Business Compliance Policy which provides that companies with up to 100 employees will have between 180 days and a year to correct violations without any enforcement action or penalty.

Once again, what we are trying to do is address—in this instance, we extended a policy which was required under the Clean Air Act, but we voluntarily decided to extend it to all statutes, because we recognize the very specific problems that small businesses have. We think that they often do not have the sophistication or the resources.

Mr. Adler mentioned the bean count. I would just say that things have changed at EPA since he worked there. In addition to this policy, last week we announced our first Small Business Technical Assistance Center for metal finishers. We did that in Baltimore. And four more centers, which directly address compliance problems of small business, will be opened around the country.

I would like to just respond to one thing which the chairman raised about the numbers of States. Our count is that 14 States have enacted, at least 10 or 11 have rejected them this session. Since our policy came out on April 30, 10 States have acted and rejected them. We think there was an initial spate of passage of these statutes and that has slowed.

I would also say that we should not lump all the State statutes together. Some provide privilege, some provide immunity, some provide limited versions of both. Our view is that our policy which gives the incentives but does not lapse into the whole, I don't know, morass of secrecy, which I think would be a terrible thing from a public policy point of view, is definitely a desirable way to go. We can accomplish what Mr. Hefley wants and what Ms. Goldman mentions and what Mr. Kelso mentions and what the previous panel did without imposing secrecy. It will encourage mistrust and it is not the way to build partnerships, which we are trying to do.

Mr. REED. Thank you, Mr. Herman.

Ms. Schiffer, you commented previously, and Mr. Rathbun commented, on the criminal aspects of this. Could you comment on the civil implications of adopting this statute?

Ms. SCHIFFER. I would be pleased to do that, Congressman Reed.

All of what we said about the problems that this secrecy, anti-enforcement bill would create in the criminal context hold true in the civil context as well. And, in fact, because civil and administrative enforcement is by far the bulk of enforcement under these statutes, it is particularly important to pay attention to what would happen in the civil enforcement area.

First of all, the definition of audit is open in this statute. It really includes anything. People could call their file cabinets an audit. People can call somebody going out and taking a look and writing it down on a piece of paper an audit. The very careful kinds of audit definitions that were alluded to in the earlier panel have nothing to do with the definition of audit in this statute.

So basically what could happen on the civil side is a company could come forward and say we have done an audit, that is, we have a piece of paper in our files, we are engaged in a very slow process of repairing things, and we would be disabled not only from doing criminal enforcement but also from doing civil enforcement in that area. And since I indicated civil enforcement is really the bulk of our enforcement, it would create an enormously serious problem.

When I say problems for law enforcement, and we in the Environment Division are really the law enforcement officers for the Government on this, we mean law enforcement to get to the result of a clean environment. I think that we all have to keep our eye on the goal that Congressman Gekas so effectively outlined; what we want is a clean environment for our children and grandchildren.

Enforcement is an important tool to getting there. It is a tool that really drives compliance by companies. And we need to be sure that we leave enforcement strong and effective. All of the provisions in this law would undo that.

Mr. REED. I would like for a moment to raise an issue with the two law enforcement representatives, Mr. Rathbun, the U.S. attorney, and Mr. Ronald, from the Arizona State Attorney General's Office.

As I read this legislation, and I think I can bear reading it again and again for more clarity, but there is language with respect to the privilege, the documentary privilege in this reporting, that says if you are making a report in imminent expectation of some type of finding or something like that, then the report is not protected. But I don't see the same type of language with respect to immunity from prosecution.

Mr. RATHBUN. That is because it is not in there.

Mr. REED. Oh. Thank you.

I am an attorney, and I was listening to Mr. Rathbun and Mr. Ronald, and if someone came to me as a corporate counsel and said, "we have a terrible problem, we have discovered rampant criminal activity going on in this subsidiary; it is terrible." I think maybe my first response, if this statute passed, would be to say we have to do an environmental audit, we have to paper this up pretty well.

We have to get everybody, particularly the worst offenders in the loop, because we want to make sure their testimony is immunized totally. We want to get everything documented, and then we might go to the EPA, the Federal authorities—I suspect we probably would—and say we had an audit, but we are taking remedial steps.

And I think, and again I am asking the two law enforcement officials, from your previous testimony, essentially when they came in with that story to you, you had to say, you are immunized, I can't do anything; is that fair?

Mr. RATHBUN. Yes. In fact, I hate to set up a roadmap, but, frankly, here is what you do under this bill. You first do a self-exam. It doesn't have to be an audit. It can be a "review" or an "investigation." Once you have done that, then you need to do two things: Promptly, you need to go to the head agency that enforces, you need to tell them, make a prompt disclosure; and, secondly, you need to initiate an action to address within a reasonable period of time.

When that happens, the bill specifically says there is immunity for—to quote the bill, it says "Shall be immune from any administrative, civil or criminal penalty for the violation."

Now, there is another provision that applies that I can try and rebut this presumption by showing what is referred to as a pattern of significant violations. But that requires either a State or a Federal court finding over the preceding 3-year period. So if there has been no Federal or State finding over that 3-year period, it is a "get out of jail free" card. It is a pass and there isn't a darned thing I can do about it.

Mr. REED. And this could be very deliberate criminal behavior, calculated, with significant adverse consequences?

Mr. RATHBUN. Absolutely. That is why I read this bill over and over again, because I couldn't believe it. But, I mean, it is there.

Mr. REED. Let me ask one other question, too. As I understand, if this privilege attaches to documentary evidence, even if the EPA legally obtained the report and it came into your hands, you could not release it to any third party or any type of civil suit or anything. You would have to maintain strict secrecy of the document.

Mr. RATHBUN. Not only that, I couldn't use it in a testimonial fashion either in any hearings.

Mr. REED. So someone could deliberately be sitting on the stand lying, based on the report you have in your hands, and you cannot use it.

Mr. RATHBUN. There is a testimonial section that says I cannot use that.

Ms. SCHIFFER. I think what is important, Congressman Reed, is to indicate that a privilege really is something that gets in the way of the search for truth. Because, after all, it is information which would help in the search for truth. And sometimes we have very overriding reasons to do it, such as the attorney-client privilege or the marital privilege. And I think we all, as a country, would agree those are very overriding reasons. But it has to be an overriding reason.

We don't lightly take the idea of getting in the way of the search for truth and there really has been no showing here that there is a reason to get in the way of the search for truth or that that would get us a cleaner environment or any other protection that we are looking for.

Mr. REED. Thank you very much, Mr. Chairman.

Mr. GEKAS. We thank the panel, and, as I have indicated before, your presence here and your testimony are very valuable to us.

Mr. REED. Mr. Chairman, if I may, we have a letter from the attorney general of Minnesota, which if we could ask to be included in the record, they have adopted a statute not like this but dealing with this issue and he has comments.

Mr. GEKAS. Without objection, we will enter it into the record.
Mr. REED. Thank you.
[The information follows:]

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

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July 25, 1995

The Honorable George Gekas
Chairman, Subcommittee on Commercial and Administrative Law
Judiciary Committee
U.S. House of Representatives
2410 Rayburn House Office Building
Washington, D.C. 20515

VIA FACSIMILE TRANSMISSION

Dear Chairman Gekas:

I am writing to urge you to reconsider the block-grant approach for funding legal services to American citizens living in poverty and continue funding of the Legal Services Corporation (LSC). The negative implications of block-grant funding in this situation translate into less civil legal services to America's growing poor population and runs counter to our Nation's promise of "equal justice under the law."

First, block-grant funding of legal services will increase costs and decrease efficiency. Unlike other programs being considered for block-grant funding, LSC funds are not administered by individual states. LSC directly funds 323 independent, local legal services programs to assure a minimum level of access in every U.S. county. There are no existing regional or state level bureaucracies to rely on for management and service delivery. Consequently, the work currently being performed by just over 100 federal employees using only 3% of the LSC budget will be recreated 50 times over as each state sets up its own administrative structures and incurs the additional costs necessary to fund, oversee and monitor legal services programs.

Second, LSC's current national formula for funding programs assures a fair distribution of funds for legal services within each state. Block-grant funding provides no guarantee that funds will be allocated fairly to local programs, thereby creating the risk of disparities in the provision of legal services within each state. In many states, for example, weaker rural communities generally exert less influence over state legislatures than other geographic areas. Inequitable distribution in such instances may be devastating since it is often the weaker rural communities that are without neighborhood law offices and most in need of legal services programs. Continued funding through LSC avoids such issues. Indeed, LSC was created by the Nixon administration not just to fill the void of legal services to the poor, but to remove the provision of those services from political influence.

Third, in addition to increased costs of administration at the state level, legal services programs will suffer if forced to compete for funding in state legislatures with other programs for low income people. Moreover, as Congress shifts the financial responsibility for other social

programs to the state, the competition for limited funds is likely to be even more intense. Unfortunately, civil legal services are not likely to rank high on the list of priorities and the occasions that legal services have been at odds with state government may further influence the outcome.

Although Minnesota has generally provided about 70% of the funding for its legal services programs, states with greater poverty rates, smaller taxable resources and fewer private resources have provided as little as 1% to 17% of funds for legal services programs within their states. While block-grant funding would certainly reduce funding in states like Minnesota, it would almost guarantee elimination of legal services in other states.

Finally, it is my understanding that you are also considering block-grant funding of legal services to Attorneys General. Attorneys General are generally supportive of continued funding of LSC as evidenced by the letter to the members of the U.S. House Appropriations Committee (copy enclosed). However, the concept of legal services block-grant funding to Attorneys General does not alter the need to incur additional costs to create new administrative structures within 50 agencies that generally do not administer federal grant programs. Furthermore, there is a high probability of conflict of interest considering that legal services providers are often opposing counsel to Attorneys General representing state agencies. Indeed, management of this type of institutional conflict of interest would impose a difficult administrative burden on Attorneys General in order to comply with rules of professional conduct.

Upon reconsideration, I think you will find that LSC funding already possesses the desired traits of block grants--local control, efficiency, diversity, flexibility and simplicity. Block-grant funding would spur the opposite results and ultimately produce considerably less funding, which in some instances, will lead to the elimination of legal services. Never before has there been a wider gap between the need for legal services for the poor and the provision of legal services. The matters handled by legal services providers often involve issues of survival and continued access to basic life essentials. As Congress continues to cut additional programs and services to the poor, these issues will become more prevalent and the legal services gap is certain to widen. Now is the time for the federal government to reaffirm its commitment to equal justice rather than retreat.

Therefore, I strongly encourage you not to fund legal services programs through block-grants, but to continue federal funding of the LSC at a meaningful level.

Best regards,

HUBERT H. HUMPHREY III
Attorney General

cc: Members of the U.S. House Judiciary Subcommittee

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July 13, 1995

The Honorable Jack Reed
U.S. House of Representatives
1510 Longworth House Office Building
Washington, DC 20515-3902

Dear Congressman Reed:

We, the undersigned State Attorneys General, urge you not to phase out or significantly reduce funding for the Legal Services Corporation (LSC). In 1974, Congress identified a need to provide "equal access to the system of justice in our Nation" to those who are unable to afford adequate legal counsel. This message has been embodied in federal law ever since, denoting its status as a matter of national priority. The LSC was created to meet that need and founded in the principle that "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice."

In 1980, the American population included over 29 million people living in poverty. According to the 1992 Census, nearly 37 million people are living in poverty, twenty-one percent of those are children, and the figures continue to rise. While LSC-funded legal services once supplied one lawyer per 5,000 poor people, it now supplies on average one lawyer per 6,000 to 7,000 indigent clients. In addition to the increase in the number of underprivileged citizens, America's legal system has grown more complex, and the poor continue to experience new and growing legal problems. LSC-funded organizations turn away thousands of low-income persons every year because they lack the resources to advise and represent them. In light of these developments, elimination of the LSC or significant funding cuts clearly run counter to the principle of equal justice for all.

The matters handled by legal services attorneys often involve issues of survival and access to basic life essentials. Counsel and assistance are provided to families to rescue them from domestic abuse and homelessness through wrongful eviction, to the elderly and disabled to maintain their financial independence, to consumers who have been duped by fraudulent and coercive practices, and to needy children to ensure essential health care and income support.

LSC-funded organizations provide their services with a high degree of efficiency and cost-effectiveness. Legal services are provided by 323 programs operating 919 neighborhood legal aid offices across the country. These programs employ about 7,000 attorneys and paralegals who spend the largest segment of their time providing counsel and advice as opposed to costly litigation. They save litigation for circumstances in which it is absolutely necessary.

Legal services lawyers earn average starting salaries of about $25,000 a year and generally can expect a pay increase of about $1,500 a year, which is well below the national average for lawyers. Yet, local programs attract dedicated public servants who provide low-income persons the kind of professional expertise that brings some balance to the scales of justice.

In addition, the LSC has established vital partnerships by leveraging its federal dollars against the funds provided by private resources and pro bono legal services. LSC actually provides an average of only two-thirds of local legal services' budgets. The remaining resources are donated by states, law firms, and charitable groups. LSC provides additional support to local legal services through the performance of administrative functions such as technical assistance, program evaluation and grant monitoring utilizing only 3 percent of the agency's total appropriation.

State and local governments have lent aid to legal services through financial assistance, enforcement of consumer laws, labor laws, and laws against discrimination, and through outreach and educational initiatives. The private bar has played a significant role in providing volunteer legal services to the poor. The operations of the LSC and its collaboration with other government, charitable, community, and private enterprises are exemplary of effective and efficient use of government dollars. It is unrealistic to think that partners of the LSC in the provision of legal services to the poor can adequately meet the needs that exist. Without the continued financial support of the LSC, many of the local programs could not survive.

Basic logic and arithmetic dictate that a deprivation of legal rights minus access to the legal system does not amount to equal justice under the law. The continued support of the private bar, charitable organizations, and state and local governments is evidence of their commitment to the common goal of equal justice and the realization that providing equal access to our legal system is a responsibility to be borne by society as a whole. The federal government also has a role to play and should continue to perform that role.

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We, therefore, strongly encourage you to continue federal funding for the LSC at a meaningful level.

Sincerely,

Hubert H. Humphrey, III
Attorney General of Minnesota

Grant Woods
Attorney General of Arizona

Bruce Botelho
Attorney General of Alaska

Robert A. Butterworth
Attorney General of Florida

Calvin E. Holloway, Sr.
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ENVIRONMENTAL IMPROVEMENT PILOT PROGRAM

BACKGROUND

The Environmental Improvement Act builds on the work of the legislature, the Attorney General's Office and the PCA over the last several years to create a fair, effective and efficient environmental compliance system that recognizes and supports businesses and governmental units that "do the right thing," that preserves the integrity of the state's environmental laws, that helps to create a level playing field for businesses and that produces real environmental results. These efforts have included the "Environmental Enforcement Act of 1991" which expanded the use of "forgivable" administrative penalty orders and created new criminal sanctions for the most egregious violations of state environmental law, and the "Land Recycling Act of 1992" which provided liability protection for people who voluntarily agreed to cleanup sites contaminated with hazardous waste.

Programs designed to protect public health and the environment apply to thousands of Minnesota businesses and governmental units. Many of these businesses and governmental units have limited expertise to deal with the environmental requirements that apply to their facilities. One important way to help assure compliance with environmental requirements is to audit facilities to determine their compliance with environmental requirements, much like a business conducts financial audits to assure that it is maintaining sound fiscal practices. The Pollution Control Agency (PCA), along with the Attorney General's Office, have encouraged environmental auditing through the Partnership Agreement with the Printing Industry of Minnesota signed in January of 1993 and, more recently, through the PCA Environmental Auditing Policy adopted by the PCA Board in January of this year.

The proposed Environmental Improvement Act expands on these efforts by establishing a four year pilot project to support environmental auditing by providing clear enforcement benefits for companies and governmental units that are "doing the right thing" by auditing their facilities, reporting problems and committing to prompt correction of the problems they identify. As an alternative to an audit, the Act authorizes businesses and governmental units to use a new self-evaluation checklist if they do not have the expertise to conduct internal audits or cannot afford the cost of an external audit. Finally, the Act allows participating companies and governmental units to be recognized for their efforts by authorizing their facilities to display a "green star" emblem that indicates the facility is in compliance with environmental requirements.

The Act should benefit businesses and governmental units by providing better information about their operations, allowing them to more learn about the environmental requirements that apply to their facilities and to correct problems that they identify,and by providing significantly increased certainty about how they will be treated in the enforcement process. It should benefit the environment by assuring that many more facilities meet or exceed the state's environmental expectations.

SUMMARY

1. Applicability.

   The Environmental Improvement Act applies to all businesses and governmental units that are regulated by the PCA. Any facility owned or operated by a business or governmental unit that has been penalized for violation of a PCA requirement must wait for one year before participating in the Environmental Improvement Program.

2. Qualifications.

To participate in the Environmental Improvement Program a business or governmental unit that does not operate a "major" facility must conduct an environmental audit or a self-evaluation. Operators of minor facilities also must examine pollution prevention opportunities at the facility to qualify for participation. "Major" facilities must conduct an environmental audit or a self-evaluation, prepare a pollution prevention plan and submit annual progress reports for their pollution prevention activities. Most "major" facilities are already required by Minn. Stat. Chapter 115D to conduct pollution prevention plans and submit annual progress reports to the PCA. For these facilities the audit legislation simply reinforces the 115D requirements. Less than 10 percent of the facilities subject to PCA requirements in Minnesota are "major" facilities.

After conducting the audit or self-evaluation a business or governmental unit would be required to submit a report to the PCA Commissioner that:

a. discloses any problems identified in the audit or self-evaluation;
b. includes a commitment to correct the problems within 90 days or, if more than 90 days is required to correct the problems, a commitment to correct the problems in the time specified in a performance schedule submitted to the Commissioner; and
c. describes the steps that have been taken to prevent recurrence of the problems.

The audit or self-evaluation does not have to be submitted to the PCA to qualify for participation in the program.

3. Performance Schedules.

If more than 90 days are needed to correct violations, the regulated entity must submit a performance schedule which is subject to approval by the PCA. The factors that must be considered in reviewing performance schedules are:

a. The nature of the violations;
b. The environmental and public health consequences of the violations;
c. the economic circumstances of the facility;
d. The availability of equipment and material; and
e. The time needed to implement pollution prevention opportunities as an alternative to pollution control approaches to remedying the violations.

4. Public Disclosure.

The commissioner of the PCA must publish quarterly the names and locations of the participants in the environmental improvement program.

5. Enforcement.

Penalties that may otherwise apply to violations of PCA requirements that are identified in the audit or self-evaluation and reported to the PCA will be waived in almost all cases if the violations are corrected within 90 days or within the time specified in an approved performance schedule. In the case where a serious criminal violation occurred or where serious harm to public health or the environment occurred which would permit an enforcement action to be taken against a participant in the program, the state must take into account the good faith efforts of the business or governmental unit in deciding what, if any, enforcement action should be pursued and what the appropriate penalty, if any, should be.

6. Audit confidentiality.

The bill incorporates by reference those portions of PCA's audit policy that deal with when audit reports might be sought by the PCA. The PCA policy provides that the agency will not, as a matter of routine procedure, request, inspect or seize environmental audit reports from regulated entities that have conducted audits in good faith, except

where the PCA believes that there is probable cause that a serious crime has been committed. Audit reports, self-evaluations, drafts, the auditor's field notes and certain correspondence related to the audits are privileged documents as to third parties if the regulated entity is participating in the environmental improvement program and if the regulated entity meets the approved performance schedule.

. "Green Star" program.

To recognize companies and governmental units that participate in the Environmental Improvement Program, the Act authorizes facilities to display a "green star" emblem for a period of two years following the date that the owner of the facility certifies that all problems identified in the audit or self-evaluation, if any, have been corrected. This aspect of the program should help support businesses and governmental units that are making special efforts to protect Minnesota's environment.

. Pilot program.

The Act is a four year pilot project. It requires the PCA, in consultation with the Attorney General's Office, to evaluate the success of the program and report those results to the legislature by January 15, 1999.

13 Sec. 8. [ENVIRONMENTAL IMPROVEMENT PILOT PROGRAM
14 ESTABLISHED.]
15 An environmental improvement pilot program is established
16 to promote voluntary compliance with environmental requirements.
17 Sec. 9. [DEFINITIONS.]
18 Subdivision 1. [APPLICABILITY.] As used in this act, the
19 terms defined in this section have the meanings given.
20 Subd. 2. [AGENCY.] "Agency" means the pollution control
21 agency.
22 Subd. 3. [ENVIRONMENTAL REQUIREMENT.] "Environmental
23 requirement" means a requirement in (1) a law administered by
24 the agency, a rule adopted by the agency, a permit or order
25 issued by the agency, an agreement entered into with the agency,
26 or a court order issued pursuant to any of the foregoing; or (2)
27 an ordinance or other legally binding requirement of a local
28 government unit under authority granted by state law relating to
29 environmental protection, including solid and hazardous waste
30 management.
31 Subd. 4. [ENVIRONMENTAL AUDIT.] "Environmental audit"
32 means a systematic, documented, and objective review by a
33 regulated entity of one or more facility operations and
34 practices related to compliance with one or more environmental
35 requirements and, if deficiencies are found, a plan for
36 corrective action. The final audit document must be designated

as an "audit report" and must include the date of the final written report of finding for the audit.

Subd. 5. [COMMISSIONER.] "Commissioner" means the commissioner of the pollution control agency.

Subd. 6. [FACILITY.] "Facility" means all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person.

Subd. 7. [LOCAL GOVERNMENTAL UNIT.] "Local governmental unit" means a county, a statutory or home rule city, a town, a sanitary district, or the metropolitan area.

Subd. 8. [MAJOR FACILITY.] "Major facility" means an industrial or municipal wastewater discharge major facility as defined in rules of the agency; a feedlot that is permitted for 1,000 or more animal units; a large quantity hazardous waste generator as defined in rules of the agency; a hazardous waste treatment, storage, or disposal facility that is required to have a permit under the federal Resource Conservation and Recovery Act, United States Code, title 42, section 6925; a major stationary air emission source as defined in rules of the agency; an air emission source that emits 50 or more tons per year of any air pollutant regulated under rules of the agency; or an air emission source that emits 75 tons or more per year of all air pollutants regulated under rules of the agency.

Subd. 9. [POLLUTION PREVENTION.] "Pollution prevention" means the elimination or reduction at the source of the use, generation, or release of pollutants.

Subd. 10. [REGULATED ENTITY.] "Regulated entity" means a public or private organization that is subject to environmental requirements.

Subd. 11. [SELF-EVALUATION.] "Self-evaluation" means a systematic, documented, and objective review by a regulated entity of one or more facility operations and practices related to compliance with one or more environmental requirements, based upon an evaluation form prescribed or approved by the commissioner.

1 Subd. 12. [STATE.] "State" means the pollution control
2 agency, the attorney general, and all local governmental units.
3 Sec. 10. [AUDITS OR SELF-EVALUATIONS.]
4 Subdivision 1. [QUALIFICATION TO PARTICIPATE IN
5 PROGRAM.] For a facility to qualify for participation in the
6 environmental improvement program, more than one year must have
7 elapsed since the initiation of an enforcement action that
8 resulted in the imposition of a penalty involving the facility.
9 In addition, a regulated entity must:
10 (1) conduct an environmental audit or a self-evaluation;
11 (2) for a major facility, prepare a pollution prevention
12 plan and submit progress reports in accordance with Minnesota
13 Statutes, sections 115D.07 to 115D.09;
14 (3) for a facility that is not a major facility, examine
15 pollution prevention opportunities at the facility; and
16 (4) submit a report in accordance with subdivision 2.
17 Subd. 2. [REPORT.] A regulated entity must submit a report
18 to the commissioner, and to a local governmental unit if the
19 report identifies a violation of an ordinance enacted by the
20 local governmental unit or of another legally binding
21 requirement imposed by the local governmental unit, within 45
22 days after the date of the final written report of findings for
23 an environmental audit or within 45 days after the completion of
24 a self-evaluation. The report must contain:
25 (1) a certification by the owner or operator of the
26 facility that the applicable requirements of subdivision 1,
27 clauses (1) to (4), have been met;
28 (2) a disclosure of all violations of environmental
29 requirements that were identified in the environmental audit or
30 self-evaluation and a brief description of proposed actions to
31 correct the violations;
32 (3) a commitment signed by the owner or operator of the
33 facility to correct the violations as expeditiously as possible
34 under the circumstances;
35 (4) if more than 90 days will be required to correct the
36 violations, a performance schedule that identifies the time that

1 will be needed to correct the violations and a brief statement
2 of the reasons that support the time periods set out in the
3 performance schedule; and
4 (5) a description of the steps the owner or operator has
5 taken or will take to prevent recurrence of the violations.
6 Sec. 11. [PUBLIC DISCLOSURE.]
7 The commissioner shall publish quarterly the names and
8 locations of the facilities for which a report has been
9 submitted under section 10, subdivision 2, and, if a performance
10 schedule has been submitted, the proposed time period for
11 completing performance.
12 Sec. 12. [REVIEW OF PERFORMANCE SCHEDULES.]
13 (a) A reasonable performance schedule prepared under
14 section 10, subdivision 2, clause (4), must be approved by the
15 commissioner. In reviewing the reasonableness of a performance
16 schedule, the commissioner shall take into account information
17 supplied by the regulated entity, any public comments, and
18 information developed by agency staff. The decision about
19 whether a performance schedule is reasonable must be based on
20 the following factors:
21 (1) the nature of the violations;
22 (2) the environmental and public health consequences of the
23 violations;
24 (3) the economic circumstances of the facility;
25 (4) the availability of equipment and material; and
26 (5) the time needed to implement pollution prevention
27 opportunities as an alternative to pollution control approaches
28 to remedying the violations. Information submitted to the
29 commissioner that is trade secret information, as that term is
30 defined in Minnesota Statutes, section 13.37, is nonpublic data
31 under Minnesota Statutes, chapter 13.
32 (b) In the event of a dispute over approval of the
33 performance schedule, the regulated entity may request a hearing
34 under the procedures in Minnesota Rules, parts 1400.8510 to
35 1400.8612. A performance schedule may be amended by written
36 agreement between the commissioner and the regulated entity.

Sec. 12. [ENFORCEMENT.]

Subdivision 1. [DEFERRED ENFORCEMENT.] The state must defer for at least 90 days to enforce an environmental requirement against the owner or operator of a facility if a report that meets the requirements of section 10, subdivision 2, has been submitted to the commissioner. If the report includes a performance schedule, and the performance schedule is approved under section 12, the state must defer enforcement for the term of the approved performance schedule unless the owner or operator of the facility fails to meet an interim performance date contained in the schedule.

Subd. 2. [PENALTIES WAIVED.] If, within 90 days after the report required in section 10, subdivision 2, is received by the commissioner or within the time specified in an approved performance schedule, the owner or operator of a facility corrects the violations identified in the audit or self-evaluation and certifies to the commissioner that the violations have been corrected, the state may not impose any administrative, civil, or criminal penalties against the owner or operator of the facility for the reported violations.

Subd. 3. [EXCEPTIONS.] Notwithstanding subdivisions 1 and 2, the state may at any time bring:

(1) a criminal enforcement action against any person who knowingly commits a violation under Minnesota Statutes, section 609.671;

(2) a civil or administrative enforcement action, which may include a penalty, under Minnesota Statutes, section 115.071 or 116.072, against the owner or operator of a facility if:

(i) less than one year has elapsed since the final resolution of a notice of violation, an administrative penalty order, or a civil or criminal lawsuit that resulted in an enforcement action being taken against the owner or operator of a facility for a violation of a requirement that was also shown as having been violated in the report required under section 10, subdivision 2; or

(ii) a violation caused serious harm to public health or

1 the environment; or
2 (3) an action against the owner or operator of a facility
3 to enjoin an imminent threat to public health or the environment.
4 Subd. 4. [GOOD FAITH CONSIDERATION.] If the state finds
5 that one of the conditions in subdivision 3 exists, the state
6 must take into account the good faith efforts of the regulated
7 entity to comply with environmental requirements in deciding
8 whether to pursue an enforcement action, whether an enforcement
9 action should be civil or criminal, and what, if any, penalty
10 should be imposed. In determining whether the regulated entity
11 has acted in good faith, the state must consider whether:
12 (1) when noncompliance was discovered, the regulated entity
13 took corrective action that was timely under the circumstances;
14 (2) the regulated entity exercised reasonable care in
15 attempting to prevent the violations and ensure compliance with
16 environmental requirements;
17 (3) the noncompliance resulted in significant economic
18 benefit to the regulated entity;
19 (4) prior to implementing the audit or self-evaluation
20 program, the regulated entity had a history of good faith
21 efforts to comply with the environmental requirements;
22 (5) the regulated entity demonstrated good faith efforts to
23 achieve compliance since implementing an environmental auditing
24 or self-evaluation program; and
25 (6) the regulated entity has demonstrated efforts to
26 implement pollution prevention opportunities.
27 Subd. 5. [VIOLATIONS DISCOVERED BY THE STATE.] Nothing in
28 this act precludes the state from taking any enforcement action
29 the state is authorized to take with respect to violations
30 discovered by the state prior to the time a regulated entity has
31 submitted to the commissioner a report that meets the
32 requirements of section 10, subdivision 2.
33 Sec. 14. [GREEN STAR EMBLEM.]
34 A regulated entity may display at a facility a "green star"
35 emblem designed by the commissioner if:
36 (1) the regulated entity qualifies for participation in the

environmental improvement program under section 10:

(2) the regulated entity certifies that all violations that were identified in the audit or self-evaluation of the facility were corrected within 90 days or within the time specified in an approved performance schedule or certifies that no violations were identified in the audit or self-evaluation; and

(3) at least one year has elapsed since the final resolution of a notice of violation, an administrative penalty order, or a civil or criminal enforcement action involving the regulated entity. The emblem may be displayed for a period of two years from the time that the commissioner determines that the requirements of this section have been met.

Sec. 15. [ACCESS TO DOCUMENTS.]

Subdivision 1. [PUBLIC ACCESS.] The state may not request, inspect, or seize a final audit report, draft audit papers, a self-evaluation form, the notes or papers prepared by the auditor or the person conducting the self-evaluation in connection with the audit or self-evaluation, or the internal documents of a regulated entity establishing, coordinating, or responding to the audit or self-evaluation, other than the report required in section 10, subdivision 2, except in accordance with the agency's policy on environmental auditing, as adopted by the agency on January 24, 1995.

Subd. 2. [THIRD-PARTY ACCESS.] After receipt by the commissioner of a report that complies with section 10, subdivision 2, the final audit report, draft audit reports, the self-evaluation form, any notes or papers prepared by the auditor or by the person conducting the self-evaluation in connection with the audit or self-evaluation, and the internal documents of a regulated entity establishing, coordinating, or responding to the audit or self-evaluation covered by the report are privileged as to all persons other than the state provided that the regulated entity is in compliance with its commitments under sections 10 and 12.

Subd. 3. [NONWAIVER OF PROTECTIONS.] Participation by a regulated entity in the environmental improvement program does

not waive, minimize, reduce, or otherwise adversely affect the level of protection or confidentiality that exists, under current or developing common or statutory law, with respect to any other documents relating to an environmental audit or self-evaluation.

Sec. 16. [NO EFFECT ON OTHER RIGHTS.]

Sections 8 to 18 do not affect, impair, or alter:

(1) rights of a regulated entity that chooses not to participate, or is not eligible to participate, in the environmental improvement pilot program; or

(2) rights of other persons relative to the matters addressed by the environmental improvement pilot program.

Sec. 17. [REPORTING REQUIRED BY LAW.]

Nothing in this act alters the obligation of any regulated entity to report releases, violations, or other matters that are required to be reported by state or federal law, rule, permit, or enforcement action.

Sec. 18. [SURVIVAL OF RIGHTS AND PROTECTIONS.]

All rights and protections provided under this act shall survive the repeal of the act with respect to any report filed under section 10, subdivision 2, that is submitted before July 1, 1999.

Sec. 19. [REPEALER.]

Sections 8 to 18 are repealed effective July 1, 1999.

Sec. 20. [REPORT.]

The commissioner, in consultation with the attorney general, shall submit a report to the chairs of the environment and natural resources committees of the senate and the house of representatives by January 15, 1999, that evaluates the effectiveness of the environmental improvement pilot program and recommends whether the program should be extended.

Sec. 21. [EFFECTIVE DATE.]

Section 7 is effective June 1, 1995.

This bill was passed in conformity to the rules of each house and the joint rules of the two houses as required by the Constitution of the State of Minnesota.

Irvin N. Anderson
Speaker of the House of Representatives.

Allan H. Spear
President of the Senate.

Passed the House of Representatives on May 9, 1995.

Edward A. Burdick
Chief Clerk, House of Representatives.

Passed the Senate on May 9, 1995.

Patrick E. Flahaven
Secretary of the Senate.

This bill is properly enrolled and was presented to the Governor on May 15, 1995.

Harry M. Walsh
Revisor of Statutes.

Approved on May 17, 1995, at 11:52 o M.

Arne H. Carlson
Governor.

Filed on May 17, 1995.

Joan Anderson Growe
Secretary of State.

Mr. GEKAS. Our final panel will now come to the table. Mr. Gish, Robert DeSchamps, and Joseph G. Block.

Now we are sure to hear a point of view that will come from the citizenry itself, and it may be the most valuable block of testimony we will have because we will know whom this affects.

We will start with Mr. Gish.

STATEMENT OF PETER ANTHONY GISH, COUNSEL, CLEAN HARBORS ENVIRONMENTAL SERVICES, INC.

Mr. GISH. Mr. Chairman, my name is Peter Gish. I am counsel for Clean Harbors Environmental Services, Inc. Clean Harbors is a national environmental services company which provides emergency spill response, remediation, and waste transportation disposal services to organizations throughout the United States. Clean Harbors' customers include 320 of the Fortune 500 companies.

Thank you for the opportunity to address the committee today and express my support for the Federal environmental audit privilege. The U.S. Government is at a crossroads. Although tremendous progress has been made to protect human health and the environment in the past 25 years since the Environmental Protection Agency was created, significant work still needs to be done. At issue is the best way to go about getting this work done.

Our experience indicates that the majority of corporations subject to environmental laws——

Mr. GEKAS. Suspend for a moment.

[Pause.]

Mr. GEKAS. I am sorry, Mr. Gish. You may proceed.

Mr. GISH. Thank you. Our experience indicates that the majority of corporations subject to environmental laws make a concerted effort to comply with Federal, State, and local requirements.

In addition to the various criminal, civil and administrative penalties imposed under applicable laws, companies also have additional incentives to protect human health and the environment. These incentives include hazardous waste liability concerns, economic competitiveness factors, potential civil liability for personal injury and property damage, and the inspector of shareholder lawsuits. All told, these factors provide considerable incentives for companies to make compliance with environmental laws a top corporate priority.

Nonetheless, significant barriers exist to achieving total compliance. The patchwork of Federal, State, and local environmental laws and regulations is very complex and at times difficult to understand. In fact, one Federal judge has referred to the Resource Recovery Conservation Act as a statute of "mind-numbing complexity."

The complexity is highlighted by the fact that each State is free to implement its own environmental initiatives above and beyond what has already been established at the Federal level. Moreover, many environmental regulations change with a frequency which can make compliance extremely challenging. This can be particularly frustrating for organizations which must modify organizational structures and the work practices of its employees to comply with the changing regulatory requirements. Depending on the size of the organization, preparing for a new or updated regulatory pro-

gram can take months, if not years. Finally, some environmental regulations would appear to contradict each other, making the job of achieving total compliance virtually impossible.

Hand-in-hand with the increase in scope and complexity of environmental regulation has come a significant enlargement of the Government's enforcement powers. Not only have the criminal and civil penalties contained in most Federal environmental statutes increased in recent years, but additional administrative penalties have also been created. For example, the Clean Air Act Amendments of 1990, section 7413(d), empowers the EPA to impose civil administrative penalties totaling up to $200,000.

Furthermore, Government is probing deeper into organizations to impose liability for noncompliance not only on officers and directors but on middle and lower level managers as well. At the same time, both EPA and the Department of Justice have stepped up their efforts to initiate civil and criminal proceedings against potential offenders.

Members of the regulated community are given few resources with which to implement the mandates contained in various environmental laws. Although EPA and the Department of Justice have encouraged the use of environmental audits to facilitate compliance with environmental laws, both EPA and the Department of Justice have reserved the right to use the findings contained in the audit reports against the organizations undertaking the audit.

While EPA's and the Department of Justice's efforts are commendable, the fact remains that organizations may not undertake environmental audits for fear that the audit reports and related data will be used against them. Perhaps more importantly, attorneys routinely advise their clients subject to environmental laws not to undertake environmental audits out of concern for the potentially damaging consequences. As a result, corporations and other members of the regulated community are effectively precluded from employing one of the most effective compliance management mechanisms available, namely a critical self-evaluation of the organization's compliance efforts. Furthermore, the current state of affairs unduly creates a need to engage counsel to protect the interests of organizations willing to undertake an environmental compliance audit, increasing the cost of conducting audits and also reducing their effectiveness.

A Federal environmental self-evaluation privilege would establish a zone of privacy within which organizations subject to environmental laws could take a long, hard look at past practices with a view toward improving future operations without the fear of reprisals.

Although regulators generally do a good job of articulating objective standards and performance criteria, and organization's management has the best understanding of the internal barriers to improved environmental compliance, when one considers the complexity of human behavior and social interaction, the need to facilitate a compliance oriented dialog within an organization subject to environmental laws becomes obvious.

I would encourage the committee to focus on what goes on within organizations subject to environmental laws. Speaking from personal experience, I know it is imperative that managers within or-

ganizations subject to environmental regulations have the opportunity to examine what takes place on a daily basis without fear of reprisals.

I would also ask the committee to examine the internal chilling effect that the current situation engenders. Many employees within organizations are not willing to come forward and express to mid- and upper-level managers events or situations of noncompliance out of fear of the penalties that may be imposed both on the organization and on themselves personally.

Mr. Chairman, I would conclude that the time has come for the Federal Government to give corporations and other members of the regulated community some measure of responsibility for carrying forth the accomplishments of the past quarter century. Undoubtedly, some unscrupulous organizations will attempt to use the claim of privilege to conceal unauthorized or illegal activities. Nonetheless, the vast majority of organizations will use the environmental audit to improve compliance, perhaps achieving goals above and beyond those mandated by law. At the end of the day, this is the goal which we all work toward and which must be facilitated.

Thank you for allowing me to appear before the committee.

Mr. GEKAS. We thank you, Mr. Gish.

[The prepared statement of Mr. Gish follows:]

PREPARED STATEMENT OF PETER ANTHONY GISH, COUNSEL, CLEAN HARBORS ENVIRONMENTAL SERVICES, INC.

Mr. Chairman, my name is Peter Gish. I am counsel for Clean Harbors Environmental Services, Inc. (Clean Harbors).

Clean Harbors is a national environmental services company which provides emergency spill response, remediation and waste transportation and disposal services to organizations throughout the United States. Clean Harbors' customers include 320 of the Fortune 500 companies. I wish to lend my support for the establishment of a Federal Environmental Audit Privilege.

The US, Government is at a crossroads. Although tremendous progress has been made to protect human health and the environment in the twenty five years since the Environmental Protection Agency (EPA) was created, significant work still needs to be done. At issue is the best way to go about getting this work done.

Our experience indicates that the majority of corporations subject to environmental laws make a concerted effort to comply with federal, state and local requirements. In addition to the various criminal, civil, and administrative penalties imposed under applicable laws, companies also have additional incentives to protect human health and the environment. These incentives include hazardous waste liability concerns, economic competitiveness factors, potential civil liability for personal injury and property damage, and the specter of shareholder lawsuits. All told, these factors provide considerable incentives for companies to make compliance with environmental laws a top corporate priority.

Nonetheless, significant barriers exist to achieving total compliance. The patchwork of Federal, state and local environmental laws and regulations is very complex and at times difficult to understand (one Federal judge has referred to the Resource Conservation & Recovery Act as a statute of "mind-numbing" complexity). The complexity is highlighted by the fact that each state if free to implement its own environmental initiatives above and beyond what has already been established at the Federal level. Moreover, many environmental regulations change with a frequency which can make compliance extremely challenging. This can be particularly frustrating for organizations which must modify organizational structures and the work practices of its employees to comply with the changing regulatory requirements. Depending on the size of the organization, preparing for a new or updated regulatory program can take months if not years. Finally, some environmental regulations would appear to contradict each other making the job of achieving total compliance virtually impossible.

Hand in hand with the increase in scope and complexity of environmental regulation has come a significant enlargement of the government's enforcement powers. Not only have the criminal and civil penalties contained in most Federal environmental statutes increased in recent years, but additional administrative penalties have also been created (see, *e.g.*, Clean Air Act Amendments of 1990, 42 U.S.C. S. 7413(d) (empowering EPA to impose civil administrative penalties totaling up to $200,000)). Furthermore, government is probing deeper into organizations to impose liability for noncompliance, not only on officers and directors, but on middle and lower level managers as well. At the same time, both EPA and Department of Justice (DOJ) have stepped up their efforts to initiate civil and criminal proceedings against potential offenders.

Members of the regulated community are given few resources with which to implement the mandates contained in various environmental laws. Although EPA and the DOJ have encouraged the use of environmental audits to facilitate compliance with environmental laws, both EPA and DOJ have reserved the right to use the findings contained in audit reports against the organization undertaking the audit. While EPA's and DOJ's efforts are commendable, the fact remains that organizations may not undertake environmental audits for fear that the audit reports and related data will be used against them. Perhaps more importantly, attorneys routinely advise their clients subject to environmental laws not to undertake audits out of concern for the potentially damaging consequences. As a result, corporations and other members of the regulated community are effectively precluded from employing one of the most effective compliance management mechanisms available, namely a critical self-evaluation of the organization's compliance efforts.

A Federal Environmental Self-Evaluation Privilege would establish a zone of privacy within which organizations subject to environmental laws could take a long, hard look at past practices with a view toward improving future compliance; without the fear of reprisals. Although regulators generally do a good job of articulating objective standards and performance criteria, an organization's management has the best understanding of the internal barriers to improved environmental compliance. When one considers the complexity of human behavior and social interaction, the need to facilitate a compliance oriented dialogue within organizations subject to environmental laws becomes obvious.

Mr. Chairman, I would conclude that the time has come for the Federal government to give corporations and other members of the regulated community some measure of responsibility for carrying forward the accomplishments of the past quarter century. Undoubtedly, some unscrupulous organizations will attempt to use the claim of privilege to conceal unauthorized or illegal activities. Nonetheless, the vast majority of organizations will use environmental audits to improve compliance, perhaps achieving goals above and beyond those mandated by law. At the end of the day, this is the goal which we all work toward and which must be facilitated.

Thank you for allowing me to appear before the Committee.

Mr. GEKAS. And now to Mr. DeSchamps.

Mr. DESCHAMPS. Actually, it is pronounced "Day Shaum."

Mr. GEKAS. DeSchamps. Bastille Day is coming up.

Mr. DESCHAMPS. Yes.

Mr. GEKAS. Proceed.

STATEMENT OF ROBERT L. DESCHAMPS, COUNTY ATTORNEY, MISSOULA, MT, AND PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Mr. DESCHAMPS. Thank you. Mr. Chairman, Mr. Reed, I want to thank you and the subcommittee for the opportunity to appear here today to provide a statement on behalf of the National District Attorneys Association and the Nation's prosecutors, and urge you not to extend a criminal privilege for environmental self-audits or inspections.

My name is Robert DeSchamps—actually, it is "Day Shaum," the way I pronounce it—county attorney for Missoula, MT, and I have served as prosecutor for over 25 years. In addition, I am proud to serve as the president of the National District Attorneys Associa-

tion, which has a membership of approximately 7,000 State and local prosecutors throughout this country.

As a premise to my remarks, let me clearly indicate that my interest and our organization's interest is limited, properly, I believe, to the criminal law aspects of this proposed legislation. It is apparent to me that there are three different aspects that we are focusing on here today. One of them is the audit privilege, another one is the testimonial privilege, and then, of course, the immunity for voluntary disclosure provisions.

We are concerned about all three of those as they apply to criminal law and I note in listening to the other testimony this morning, that every horror story we heard involved examples of administrative penalties that were being imposed and I don't recall hearing any that involved actual criminal prosecution.

Now, I try cases myself on a regular basis. And my testimony today is based on my perception of the effect that this type of legislation would have on my ability to protect the people in my county. These views are shared by my colleagues and last summer, at our annual board of directors meeting, we passed a resolution, which is attached to my testimony, condemning the environmental audit privilege. We unanimously adopted that resolution.

As the consideration of H.R. 1047, the Voluntary Environmental Self-Evaluation Act, continues, we would ask you to keep in mind the practical realities of what you are imposing; that is, understanding the actual effect that initiating a criminal privilege will have on the daily work of America's prosecutors, both State, local, and Federal.

First, let me issue a challenge to this subcommittee. Today you are considering a privilege for one segment of our industry. Have you considered the impact that a sufficient privilege might have on other aspects of business and industry?

We heard earlier from Mr. Rathbun, the U.S. Attorney from Kansas. He gave some, I think, perfectly valid examples of the sorts of ways this privilege could be applied in other circumstances outside of environmental litigation.

Isn't it only fair in equity that if we are going to give one branch of industry or business a privilege or an immunity, shouldn't we in fairness apply it to other similar types of entities?

I don't think that we, today, can predict the range and the extent of this as it might affect other kinds of white-collar crime prosecutions in the future, all of which are cases that involve paper, business documents, and so forth. I would urge you caution when thinking of how that might be applied across the board to other things.

There is a second basis for our concern. If this privilege is granted, it would become virtually impossible, we believe, to gain access to the environmental records of any industry or business. The present practice, among many corporations, and we heard this again in testimony this morning, specifically Mr. Stanga, the environmental affairs counsel for Litton Industry, testified to you that it is his practice to involve his counsel in environmental audits.

We believe that this will become all the more common, where corporate counsel or outside law firms will become involved as the auditors. This provides counsel the ability to claim, when chal-

lenged, that the environmental records are, as has historically been the case, covered by the attorney-client privilege, or perhaps because they are covered by part of the litigation process. But now you are adding a third claim; that these are privileged because of the environmental audit privilege.

The Voluntary Environmental Self-Evaluation Act would add just simply another layer of privilege, another layer of litigation, another area of problem for us in enforcing the environmental laws. Any and all documents pertaining or even mentioning the word environment could be part and parcel of the ongoing environmental audit. Again, it is not clear from the testimony what all goes into this umbrella.

When they are requested, we, at best, have to go into court and have some sort of ongoing litigation over whether they are privileged or not. We think this could be endless. It could lead to almost certain defeat in most cases, and, because of just the expense and trouble involved, it could evolve into probably more pretrial maneuvering and litigation than maybe the case in chief.

I think it is crucial that you understand the importance the documents have in the prosecution of white-collar crime, including environmental claims. Depending on the case, they have at least two uses, and these have come up in testimony previously: First, they show the knowledge of the actors, that is criminal intent or criminal negligence, which is always an element in virtually every criminal prosecution; secondly, there is the concern, of course, about eliciting testimony from witnesses and using these documents to impeach or refresh witnesses that appear before the grand jury or in trial court. Hostile or lying witnesses, that we are often confronted with, can have their testimony challenged by documents. But if they are privileged or otherwise unavailable to us, that simply cannot be done.

In closing, I would make several points. First, I find it ironic, that Congress, after passing the Take Back Our Streets Act and antiterrorism legislation would take a soft stance on crime by handicapping prosecutors with a bill of this nature. You have charged us with enforcing statutes the Congress deemed necessary to protect the American people. These are your laws you asked us to enforce. I take it as a type of compliment that we are doing such a good job that the industries affected need to push this type of relief to protect themselves.

Secondly, I also find it ironic that the House of Representatives, after passing measures such as habeas corpus reform, tort reform, and others designed to limit litigation, would consider an act of this nature, which, I guarantee you, will lead to endless litigation.

I, on behalf of the district attorneys of the United States, would like to thank you and this subcommittee for the opportunity to testify. We urge you not to tie our hands in discharging our duties.

And I would ask, Mr. Chairman, that my testimony and the attachment thereto be made a part of the record. Thank you.

Mr. GEKAS. Without objection, it is so ordered.

[The prepared statement of Mr. DeSchamps follows:]

PREPARED STATEMENT OF ROBERT L. DESCHAMPS, COUNTY ATTORNEY, MISSOULA, MT, AND PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION

I WANT TO THANK THE SUBCOMMITTEE FOR THIS OPPORTUNITY TO PROVIDE A STATEMENT ON BEHALF OF THE NATION'S PROSECUTORS AND TO URGE THAT A CRIMINAL PRIVILEGE NOT BE EXTENDED TO ENVIRONMENTAL SELF AUDITS OR INSPECTIONS. I AM DUSTY DESCHAMPS, COUNTY ATTORNEY FOR MISSOULA, MONTANA, AND HAVE SERVED AS A PROSECUTOR FOR OVER 25 YEARS. IN ADDITION, I AM PROUD TO SERVE AS THE PRESIDENT OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND AM HERE TO PROVIDE YOU WITH THE VIEWS OF THAT 7000 MEMBER ORGANIZATION.

AS A PREFACE TO MY REMARKS LET ME CLEARLY INDICATE THAT, AS A LAW ENFORCEMENT ORGANIZATION OUR VIEWS ARE LIMITED, PROPERLY I BELIEVE, TO THE ASPECTS OF THE PROPOSED LEGISLATION THAT PERTAIN TO CRIMINAL LAW. SECONDLY, I AM NOT A LAW PROFESSOR OR SCHOLAR ON CRIMINAL PRIVILEGE; I STILL TRY CASES ON A REGULAR BASIS AND MY TESTIMONY IS BASED UPON THE EFFECT YOUR WORK TODAY WILL HAVE ON MY ABILITY TO PROTECT THE PEOPLE OF MY COUNTY, TOMORROW. THESE VIEWS ARE SHARED BY MY COLLEAGUES ACROSS THIS COUNTRY. AT OUR BOARD OF DIRECTORS MEETING LAST YEAR A RESOLUTION CONDEMNING AN ENVIRONMENTAL AUDIT PRIVILEGE WAS UNANIMOUSLY ADOPTED AND I OFFER THAT RESOLUTION TODAY AS OUR FORMAL POLICY POSITION.

AS THE CONSIDERATION OF HOUSE RESOLUTION 1047, THE "VOLUNTARY ENVIRONMENTAL SELF-EVALUATION ACT," CONTINUES WE WOULD ASK THAT YOU KEEP IN MIND THE PRACTICAL REALITIES OF WHAT YOUR ARE PROPOSING; THAT IS, UNDERSTANDING THE ACTUAL EFFECT INITIATING A CRIMINAL PRIVILEGE WILL HAVE ON THE DAILY WORK OF AMERICA'S PROSECUTORS- LOCAL, STATE AND FEDERAL.

FIRST, LET ME ISSUE A CHALLENGE TO THIS SUBCOMMITTEE. TODAY YOU ARE CONSIDERING A PRIVILEGE FOR ONE SEGMENT OF INDUSTRY AND SPECIFICALLY FOR ONE SPECIFIC FUNCTION OF THAT INDUSTRY. HAVE YOU

CONSIDERED, HOWEVER, THE POTENTIAL IMPACT GRANTING THAT ONE PRIVILEGE MAY HAVE? WHAT OTHER BUSINESS OR INDUSTRIAL PRACTICES CAN CLAIM, OUT OF EQUITY - OUT OF FAIRNESS, THAT THEY TOO DESERVE A SIMILAR PRIVILEGE? I WOULD HAZARD A GUESS THAT NONE OF US HERE TODAY CAN REASONABLY DISCUSS THE FULL RANGE OF POSSIBLE BUSINESS RECORDS, REVIEWS, AUDITS AND THE LIKE THAT COULD CLAIM EQUAL STANDING FOR YOUR ATTENTION SHOULD THIS LEGISLATION PASS IN ITS PRESENT FORM. ANY TYPE OF WHITE COLLAR CRIME IS DIFFICULT TO PROSECUTE AND IS USUALLY A "PAPER CASE," THAT IS A CASE BASED UPON RECORDED TRANSACTIONS AND BUSINESS DOCUMENTS. THE PROTECTIONS THAT YOU OFFER TO ONE TYPE OF BUSINESS DOCUMENT COULD HAVE CONSEQUENCES BEYOND WHAT YOU ENVISION AND I SUGGEST THAT ALONE SHOULD URGE CAUTION.

THERE IS A SECOND BASIS FOR OUR CONCERN REGARDING THIS ACT. IF THIS PRIVILEGE IS GRANTED IT WILL BECOME VIRTUALLY IMPOSSIBLE TO GAIN ACCESS TO THE ENVIRONMENTAL RECORDS OF ANY INDUSTRY OR BUSINESS. THE PRESENT PRACTICE AMONG MANY CORPORATIONS IS TO INVOLVE THEIR CORPORATE COUNSEL, OR AN OUTSIDE LAW FIRM, IN THEIR ENVIRONMENTAL PROGRAM. THIS PROVIDES COUNSEL THE ABILITY TO CLAIM, WHEN CHALLENGED, THAT THE ENVIRONMENTAL RECORDS ARE EITHER PROTECTED UNDER THE ATTORNEY-CLIENT PRIVILEGE OR ARE PROTECTED BECAUSE THEY ARE PART OF THE LITIGATION PROCESS. WHILE THERE ARE MEANS TO ATTEMPT TO OBTAIN SOME OF THESE DOCUMENTS THROUGH DISCOVERY IN THE CRIMINAL JUSTICE SYSTEM, THESE ARE NOT FOOLPROOF AND APPELLATE COURTS ARE DIVIDED ON THE PROTECTIONS DUE ENVIRONMENTAL RECORDS. THE "VOLUNTARY ENVIRONMENTAL SELF-EVALUATION ACT" WOULD ADD ANOTHER LAYER OF PRIVILEGE TO THOSE ALREADY BEING ASSERTED BY BUSINESS AND INDUSTRIAL INTERESTS. WERE I A SMART CORPORATE COUNSEL, AND I'M SURE THEY ARE OR THEY WOULDN'T LAST LONG, I WOULD REMAIN AS THE FOCAL POINT OF MY

INDUSTRY'S ENVIRONMENTAL EFFORT. ANY AND ALL DOCUMENTS PERTAINING, OR EVEN MENTIONING THE WORD "ENVIRONMENT" WOULD BE PART AND PARCEL OF THE ONGOING ENVIRONMENTAL AUDIT. THEN WHEN ANY DOCUMENTS ON OUR ENVIRONMENTAL PROGRAM ARE REQUESTED I WOULD BE ABLE TO ASSERT DOUBLE OR EVEN TRIPLE LEVELS OF PRIVILEGE TO DENY PRODUCTION.

THE LITIGATION THAT WOULD ENSUE TO FORCE DISCLOSURE WOULD BE ENDLESS AND, WITH MULTIPLE POSSIBLE PRIVILEGES, AN ATTEMPT BY THE GOVERNMENT- STATE OR FEDERAL - WOULD BE VIRTUALLY CERTAIN OF DEFEAT, IF ONLY BECAUSE OF THE PROLONGED NATURE OF THIS SINGLE ISSUE. WHILE THE PROPOSED LEGISLATION PURPORTS TO HAVE CAVEATS THAT WOULD WITHHOLD THE PRIVILEGE UNDER CERTAIN CIRCUMSTANCES, THE LITIGATION TO REACH TO A DETERMINATION THAT THE DOCUMENTS MUST BE TURNED OVER TO THE GOVERNMENT COULD ECLIPSE THE CASE-IN-CHIEF IN COMPLEXITY, COST AND DURATION.

IT IS CRUCIAL TO MAKE SURE THAT YOU UNDERSTAND THE IMPORTANCE THAT DOCUMENTS HAVE IN THE PROSECUTION OF A WHITE COLLAR CRIME. DEPENDING ON THE CASE THEY HAVE AT LEAST TWO USES AND THESE ARE NOT MUTUALLY EXCLUSIVE. FIRST, THEY SHOW THE KNOWLEDGE OF THE ACTORS; THAT IS THE CRIMINAL INTENT OR CRIMINAL NEGLECT THAT IS A VITAL ELEMENT OF CRIMES OF THIS NATURE. I WOULD NOT EXPECT THERE TO BE ANYTHING AS FLAGRANT AS THE PROVERBIAL "SMOKING GUN," OR PERHAPS CHIMNEY IN THIS CASE. IN THE INSTANCE OF AN ENVIRONMENTAL CRIME THE CORPORATE DOCUMENTS COULD, INSTEAD, SHOW THE INCREASING CONCERN OF EMPLOYEES OVER A SPECIFIC PRACTICE AND TO WHOM THAT CONCERN WAS EXPRESSED; THEY COULD SHOW TECHNICAL READINGS AND THEIR INTERPRETATIONS THAT DEMONSTRATE A DISREGARD FOR COMMON PRACTICES OR TOLERANCES; OR THEY COULD SHOW STOP-GAP OR TEMPORARY FIXES TO INCREASINGLY DANGEROUS PRACTICES.

WITHOUT THIS TRAIL OF DOCUMENTS, ENVIRONMENTAL CRIMES, AS WITH MOST OTHER WHITE COLLAR CRIMES, ARE EXTREMELY DIFFICULT TO PROSECUTE.

DOCUMENTS OF THIS NATURE PLAY A SECOND ROLE IN ENVIRONMENTAL PROSECUTIONS; A ROLE DIRECTLY RELATED TO ELICITING TESTIMONY FROM WITNESSES EITHER BEFORE THE GRAND JURY OR IN THE OPEN COURT. HOSTILE OR LYING WITNESSES CAN HAVE THEIR TESTIMONY CHALLENGED WITH DOCUMENTS; THOSE WHO HAVE FORGOTTEN OCCURRENCES FROM PREVIOUS YEARS CAN HAVE MEMORIES REFRESHED; AND INFORMATION FROM WITNESSES, NOT AVAILABLE TO TESTIFY FOR ANY NUMBER OF REASONS, CAN BE PRESENTED THROUGH DOCUMENTS.

AS A PROSECUTOR I EXERCISE A GREAT DEAL OF DISCRETION IN HOW CASES ARE FILED AND PROSECUTED. IN THIS AUTHORITY I AM RESPONSIBLE TO THE PEOPLE OF MISSOULA COUNTY THAT ELECTED ME TO OFFICE. THEY HAVE TRUSTED MY JUDGEMENT ENOUGH TO RETURN ME TO OFFICE 7 TIMES. BUT I WILL STAND FOR REELECTION AGAIN IN 1998 AND WILL HAVE TO RISK THEIR JUDGEMENT ONCE AGAIN. I SAY THIS TO PREFACE MY THOUGHTS ON THE EPA'S INTERIM POLICY ON ENVIRONMENTAL AUDITS. IN OUR SYSTEM OF CRIMINAL JUSTICE THERE ARE NO ABSOLUTES, NO GUARANTEES SUCH AS THE SUPPORTERS OF THIS PRIVILEGE DESIRE. THE PROMISE OF CONSIDERATIONS, LENIENCY FOR COOPERATION; THESE ARE CONCEPTS RECOGNIZED IN OTHER AREAS OF CRIMINAL LAW AND ARE, I WOULD ARGUE, EQUALLY PROPER IN THESE CIRCUMSTANCES. SHOULD WE PROVIDE GUARANTEES TO BUSINESS INTERESTS THAT WE, AS ELECTED OFFICIALS LACK? IF THE PEOPLE OF MISSOULA TRUST MY JUDGEMENT, THE EXERCISE OF MY DISCRETION, DO CORPORATE INTERESTS DESERVE MORE?

IN CLOSING I WOULD LIKE TO MAKE SEVERAL POINTS. FIRST, I WOULD FIND IT IRONIC IF THIS CONGRESS, AFTER HAVING PASSED THE "TAKE BACK OUR

STREETS ACT" AND ANTITERRORISM LEGISLATION, WOULD TAKE A SOFT STANCE ON CRIME BY HANDICAPPING PROSECUTORS WITH A BILL OF THIS NATURE. YOU HAVE CHARGED US WITH ENFORCING STATUTES THAT THE CONGRESS HAS DEEMED NECESSARY TO PROTECT THE AMERICAN PEOPLE. I TAKE IT AS A TYPE OF COMPLIMENT THAT WE ARE DOING A GOOD JOB IF THE INDUSTRIES AFFECTED NEED TO PUSH THIS TYPE OF RELIEF. SECONDLY, I ALSO FIND IRONY THAT THE HOUSE OF REPRESENTATIVES, AFTER PASSING MEASURES SUCH AS HABEAS REFORM AND TORT REFORM, BOTH DESIGNED TO LIMIT LITIGATION, WOULD CONSIDER AN ACT OF THIS NATURE WHICH IS GUARANTEED TO LEAD TO ENDLESS LITIGATION.

I, ON BEHALF OF THE DISTRICT ATTORNEYS OF THIS NATION, WOULD LIKE TO THANK YOU, AND THIS SUBCOMMITTEE FOR THIS OPPORTUNITY TO TESTIFY. WE URGE YOU NOT TO TIE OUR HANDS IN DISCHARGING THE DUTIES YOU HAVE ASSIGNED TO US, BUT RATHER SEEK LESS ONEROUS SOLUTIONS.

Mr. GEKAS. Mr. Block.

STATEMENT OF JOSEPH G. BLOCK, ESQ., VENABLE BAETJER, HOWARD & CIVILETTI

Mr. BLOCK. Mr. Chairman, I would like to thank you and this subcommittee for inviting me to speak on perhaps the most important environmental enforcement policy decision facing lawmakers and regulators today, the enactment of a limited statutory privilege for voluntary environmental audits.

I support the enactment of H.R. 1047. If adopted, it would substantially increase environmental compliance in this country. H.R. 1047 would do so by assuring the regulated community that it can safely police itself. As a result, it would encourage companies that take their environmental obligations seriously to identify compliance problems in their early stages and, thereby prevent a great deal of pollution before it ever occurs. This would, at the same time, enable government enforcement agencies to spend their limited resources on identifying and bringing to justice the most egregious violators of environmental laws, as well as on cleaning up existing pollution.

I am here to share my views on how to best resolve this issue as one who has participated in this ongoing debate from both sides of the fence, as the former head of the Department of Justice environmental crimes section and, now, as a private practitioner who represents companies in criminal and civil matters concerning the environment.

I am familiar with the current EPA and DOJ policies. In my former position as head of the crimes section, I helped prepare the first DOJ policy position in response to States in which the legislatures were considering passing an environmental audit privilege. I helped draft a DOJ letter to then Arizona Attorney General Robert Corbin in March 1989 which opposed Arizona's ground breaking effort.

On my part, this was largely the instinctual response of a prosecutor. My criterion for assessing the merits of an audit privilege at that time, a time when criminal enforcement of environmental crimes was still gathering momentum, was simply whether, taken in isolation, the privilege would make it easier or harder for Federal enforcement personnel to investigate and prosecute environmental violations. I did not seriously consider the overall effect that the creation of an audit privilege might have on preventing pollution before it occurs.

Now that I am in private practice, I have seen the other side of the equation: How the regulated community responds to incentives or disincentives created by the EPA and DOJ audit policies. I have come to believe that the current EPA and DOJ policies are well meaning, but counterproductive.

The current policies discourage many companies from auditing themselves effectively and, thus, deprive the public of the benefits of the most cost effective form of environmental protection, companies' self-detection of small problems before they become big ones and prompt remedial action.

The current EPA and DOJ policies do not do enough to assure companies that their efforts to do the right thing will not simply

result in their bringing excessive penalties or even criminal prosecutions upon themselves for violations which would have otherwise gone undetected. Therefore, many companies continue to choose not to audit and companies which do audit do so with much circumspection and trepidation. As a result, society has realized only a small portion of the potential environmental benefit to be gained from companies' self-policing efforts.

From the vantage point of the regulated community, the current policies are shortsighted and inhibit many businesses, especially small and midsized companies, from performing effective audits. Today, companies audit in spite of, not because of, Government policy.

Mr. Chairman, I would ask that the full text of my written remarks be incorporated into the record.

Mr. GEKAS. Without objection, it is so ordered.

[The prepared statement of Mr. Block follows:]

PREPARED STATEMENT OF JOSEPH G. BLOCK, ESQ., VENABLE, BAETJER HOWARD & CIVILETTI

I. INTRODUCTION

I would like to thank Chairman Gekas and this Subcommittee for allowing me to speak on perhaps the most important environmental policy decision facing lawmakers and regulators today—the enactment of a limited statutory privilege for voluntary environmental audits. I support the enactment of H.R. 1047. If adopted, it would substantially increase environmental compliance in this country, yet would reduce the burden on the already overextended government resources available to enforce environmental laws. H.R. 1047 would do so by assuring the regulated community that it can safely police itself. As a result, it would encourage companies that take their environmental obligations seriously to identify compliance problems in their early stages and thereby prevent a great deal of pollution before it ever occurs. This would, at the same time, enable government enforcement agencies to spend their limited resources on identifying and bringing to justice the most egregious violators of environmental laws, as well as on cleaning up existing pollution.

I am testifying today as an individual, though I have spoken previously before EPA on the behalf of several corporate clients on this issue before. I am here to share my views on how to best resolve this issue, as one who has participated in this ongoing debate from both sides of the fence—as former head of the Department of Justice ("DOJ") Environmental Crimes Section and as a private practitioner who defends companies in criminal and civil matters concerning the environment.

I am intimately familiar with the current EPA and DOJ policies. In my former position as the head of the Environmental Crimes Section, I helped prepare the first DOJ policy position in response to states in which the legislatures were considering passing an environmental audit privilege. I helped draft a DOJ letter to then Arizona Attorney General Robert Corbin in March of 1989, which opposed Arizona's ground breaking effort.

On my part, this was largely the instinctual response of a prosecutor. My criterion for assessing the merits of an audit privilege at that time—a time when criminal enforcement of environmental crimes was still gathering momentum—was simply whether, taken in isolation, the privilege would make it easier or harder for federal enforcement personnel to investigate and prosecute environmental violations. Since the audit was potentially the "smoking gun" that would help to prove knowledge of violations on the part of the company and its employees, the decision to oppose a privilege was all too easy. I did not seriously consider the effect that creation of an audit privilege might have on preventing pollution before it occurred.

Now that I am in private practice, I have seen the other side of the equation—how the regulated community responds to incentives, or disincentives, created by the EPA and DOJ audit policies. I have come to believe that the current EPA and DOJ policies are well-meaning but counter-productive. The current policies discourage many companies from auditing themselves effectively, and thus deprive the public of the benefits of the most cost-effective form of environmental protection—companies' self-detection of small problems before they become big ones and prompt remedial action.

As I will discuss below, the current EPA and DOJ policies do not do enough to assure companies that their efforts to "do the right thing" (by carefully policing themselves) will not simply result in their bringing excessive penalties or criminal prosecutions upon themselves for violations which would have otherwise gone undetected. Therefore, many companies continue to choose not to audit. And, importantly, companies which do audit, do so with such circumspection and trepidation. As a result, society has realized only a very small portion of the potential environmental benefit to be gained from companies' self-policing efforts.

II. BENEFITS OF ENVIRONMENTAL AUDITING AND DISCLOSURE

When considering the Clean Air Act Amendments of 1990, Congress clearly recognized the benefits of encouraging companies to routinely audit their environmental compliance and to disclose violations discovered as a result of such audits. For example, the Senate Conference Report provided:

> Nothing in subsection 113(c) is intended to discourage owners and operators of sources subject to this Act from conducting self-evaluations or self-audits and acting to correct any problems identified. On the contrary, the environmental benefits from such review and prompt corrective action are substantial and section 113 should be read to encourage self-evaluation and self-audits.
>
> Owners and operators of sources are in the best position to identify deficiencies and correct them, and should be encouraged to adopt procedures where internal compliance audits are performed and management is informed. Such internal audits will improve the owners' and operators' ability to identify and correct problems before, rather than after, government inspections and other enforcement actions are needed.
>
> The criminal penalties available under subsection 113(c) should not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting an audit or while attempting to correct any deficiencies identified in the audit or the audit report itself should not ordinarily form the basis of the intent which results in criminal penalties.

There are numerous ways that routine compliance audits help companies become better and more efficient at identifying small environmental problems before they become big ones. Routine auditing can help companies to:

reaffirm with all levels of management and employees the value of seeking to improve compliance and pollution prevention efforts,

integrate the management of the various environmental media,

prioritize compliance concerns,

budget for environmental problems,

generate protocols and checklists which help facilities better manage themselves,

provide a forum for lower level employees to report any information concerning violations,

focus facility managers' attention on current and upcoming regulatory requirements,ensure that requirements are met for mandatory disclosure and reporting, and

anticipate and respond to emergency situations.

While the enormous benefits of routine auditing are generally accepted and have not been subject to much debate, federal regulators and the regulated community have parted company over ways to create the best incentives to audit. EPA and DOJ appear to have convinced themselves that the current policies do not discourage significant numbers of companies from routinely auditing in an aggressive manner, despite the increasingly ominous enforcement milieu—which is due largely to the increasing number and complication of environmental laws, the rapidly increasing enforcement resources (and resulting sentences and penalties assessed), and the diluted standard for showing criminal intent under environmental laws. However, from the vantage point of the regulated community, the current policies are shortsighted and inhibit many businesses—especially small and mid-sized companies—from performing effective audits. Today, companies audit in spite of, not because of, Government policies.

III. A GENERAL ASSESSMENT OF THE CURRENT EPA AND DOJ APPROACH

EPA and DOJ maintain that greater incentives and assurances for companies are simply not necessary because:

1) past practice at EPA and DOJ has proven to the regulated community that they will not use audit materials to prosecute or file civil actions against companies; and

2) the majority of regulated companies already implement environmental auditing programs.

Unfortunately, such a posture ignores the subtle (and sometimes not so subtle) realities of how things actually work in the current enforcement system. While agencies may have rarely used audit materials in court as part of litigated enforcement proceedings, regional enforcement personal frequently obtain and use audits as bargaining leverage to extract consent decrees and plea bargains, without any meaningful oversight by EPA's Office of Enforcement and Compliance Assurance or DOJ's Environmental Crimes Section. Similarly, to claim that the majority of companies currently audit in some form or another says nothing about the thousands that do not audit at all or whether the quality of many company audits is sufficient to achieve the goal of maximizing pollution prevention through self-policing.

A. Federal Enforcement Authorities Frequently Use Audit Materials Against Companies

The argument that EPA and DOJ have rarely used audit materials as a basis for actual prosecution or filing of civil suits is a strawman. The reality is that EPA and DOJ frequently request and use audit materials against companies. In a recent article on the subject of EPA's new policy, James Moore, a private practitioner and noted expert in this area, states that "a Price Waterhouse survey of industry disclosed 25 incidents where confidential audit information had been sought by government agencies or others seeking to use the information against the companies that were audited."[1]

My experience has been that audit materials are frequently requested and used as leverage to obtain plea bargains and settlement agreements favorable to the government, eliminating the need for the government to actually prosecute or file civil suit based upon the audit materials. Just last week, an Assistant United States Attorney agreed with me and several other attorneys defending our client corporation in an enforcement action that there was nothing left to investigate and that the matter was virtually closed. However, the AUSA demanded that we turn over all audit materials related to the period in question and refused to guarantee that the matter would be officially closed even if we were to turn over the materials. Similarly, I have had the experience of a prosecutor, who is hell-bent to make a criminal case, go over an internal audit line by line with a company's audit team and line management before the grand jury. These kinds of tactics unquestionably undermine the regulated community's confidence that EPA or DOJ will not routinely obtain and use audit materials against companies.

Of course, there are many instances where disclosures as a result of audits have been made, and EPA or DOJ has treated companies fairly and appropriately. But it is, to a large degree, an arbitrary process that leads to the broad-based perception that a full blown auditing program leaves a company vulnerable to the whims of an enforcement system where a "body count" of convictions and penalties is often times the sole measure of success for agency staff.

B. The Majority of Companies May Audit, But the Quality of Their Audits Is Significantly Diminished by Current EPA and DOJ Practice

In many instances, although companies may implement an audit program of some sort, they do not necessarily audit frequently and comprehensively. Similarly, their audit results are drafted with the prospect in mind that enforcement agents may read them. All this adds up to audits which do not prove nearly as effective in preventing environmental problems as they would under an enforcement policy with more positive assurances.

As a result of the current EPA and DOJ policies, the standard advice published in corporate legal publications reflects that companies inevitably sacrifice effective auditing

in favor of minimizing exposure to enforcement actions. Companies are counseled to, among other things:

involve attorneys in an otherwise technical, nonlegal process;
craft the language in audits to be less informative;
sharply limit distribution of audits; and
destroy audits after a short period of time.

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[1] *See*, Moore, Jim and Newkirk, Nancy, "Not Quite A Giant Step," *The Environmental Forum* (May/June 1995, 16–20.

While these types of practices help to protect information from disclosure, they also diminish the effectiveness of the audit process. They skew a company's focus from identifying problems for management and determining how capital should best be allocated to remediate environmental problems. Instead, they focus on drafting audit reports to minimize exposure; they perpetuate a company's inability to communicate accurately with parts of the organization that need to be involved; they reduce the ability of senior managers to systematically track and cure problems in their own organization; and, they diminish the ability to garner budgetary support for curing chronic environmental problems because audit reports downplay the size and urgency of problems.

IV. A MORE SPECIFIC CRITIQUE OF EPA AND DOJ POLICIES

Although EPA's new interim policy of April 1995 makes strides in a positive direction—mainly by recognizing the need for providing reduced penalties to companies that voluntarily disclose violations—it does not provide enough of a "safe harbor" to assure companies that their efforts to "do the right thing" will not simply invite excessive penalties which would have otherwise never been assessed. Similarly, DOJ's policy of June 1991 does not provide the assurances necessary to achieve the goal of meaningful and efficient self-policing.

A. Neither EPA Policy Nor DOJ Policy Is Binding Law

The most basic problem is that, EPA and DOJ policies are not binding law. The United States Supreme Court has repeatedly held that agency guidance is not enforceable against the agency itself.[2] EPA's new policy is quite clear on this point:

> This interim policy is not final agency action, but is intended solely as guidance. It is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this interim policy or to act at variance with the guidance based on analysis of case-specific facts and circumstances. Application of this policy to the facts of any individual case is at the sole discretion of EPA and is not subject to review by any court.[3]

Similarly, DOJ expressly reserves sole discretion under its policy:

> The criteria set forth above are intended only as internal guidance to Department of Justice attorneys. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor do they in any way limit the lawful litigative prerogatives, including civil enforcement actions, of the Department of Justice or the Environmental Protection Agency.[4]

DOJ's broad retention of discretion is particularly troublesome in light of its recent decentralization of environmental criminal prosecutions and its delegation of greater discretion in seeking such prosecutions in the hands of local U.S. Attorneys. Prior to August 1994, environmental prosecutions involving the use of a company's audit required the approval of the DOJ's Environmental Crimes Section. This is no longer the case, creating the prospect of inconsistent prosecutorial decisions regarding the use of audits in the prosecution of environmental crimes. This severely undermines the proposed policy's goal of providing consistent and predictable consequences of self-policing and disclosure.

B. EPA's New Policy Does Not Provide Definitive Assurances

In addition to the fact that EPA policy is not binding law, the "protections" offered under EPA's new policy are far from clear and persuasive. First, EPA's policy applies only to "voluntary" disclosures. "Voluntary," in turn, is defined in the interim policy as "not required by statute, regulation, permit, order, or agreement."[5] This condition largely eviscerates the rule because many environmental statutes, regulations, and permits require disclosure of violations. For example, a company that learns that it has made incorrect monthly reports pursuant to its NPDES permit

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[2] *See, e.g., U.S.* v. *Caceres*, 440 U.S. 741 (1979).

[3] 60 Fed. Reg. 16879 (April 3, 1995).

[4] Richard B. Stewart, Assistant Attorney General Memorandum on "Exercise of Criminal Prosecutorial Discretion for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (June 3, 1991).

[5] 60 Fed. Reg. at 16877

would not be making a voluntary disclosure because a regulation requires correction of any mistake in reporting.

Unless the notion of "voluntariness" is modified so that the benefits of the proposed policy apply to all self-disclosures *unless the government is aware of the matter and formal investigation has begun,* the policy sends a hopelessly mixed signal. After all, the purpose of the proposed policy is to "promote environmental compliance" and "prompt correction of violations," goals which apply with equal force to both "voluntary" and "non-voluntary" disclosures.

Second, EPA's promise not to refer companies for criminal prosecution is insufficient, given that DOJ can initiate such actions on its own. Again, this is a particular concern for companies today because the standard for criminal intent under most environmental statutes is "knowing" violation that is barely more stringent than mere negligence, as opposed to the typical, substantially more stringent standard of "specific intent" found under most other criminal statutes.[6]

Third, EPA's promise to eliminate or reduce civil penalties for violations discovered as a result of routine audits and voluntarily disclosures does not apply in instances where the Agency can reasonably characterize conduct as "criminal." Because the criminal standard in many instances amounts to little more than negligence standard, this exception could readily swallow the rule, unless the exception were to apply only in instances of clearly *intentional* behavior.

Fourth, EPA's policy does not apply to "criminal acts" of individual managers or employees. While no one condones willful violations of the law that cause or threaten serious harm, companies legitimately may be concerned about making employees vulnerable to criminal prosecution for good faith mistakes or mere negligence. At a minimum, the interim policy should reference the January 1994 EPA Memorandum ("The Exercise of Investigative Discretion"), which states that "significant environmental harm" and "culpable conduct" are the two general measures for initiating a criminal investigation. In so doing, the policy should limit criminal referrals of individuals to egregious cases of intentional misconduct.

Fifth, EPA's policy does little to assure the regulated community that environmental audits will not be routinely sought as part of the agency's enforcement efforts. The proposed policy provides only that EPA will not request a voluntary environmental audit to "trigger" a civil or criminal investigation, leaving open the possibility, and indeed likelihood, that audits will be routinely sought in the course of an enforcement action or investigation. Furthermore, the interim policy is also completely silent regarding the later release of audits in the government's possession to third parties such as through Freedom of Information Act requests and other means.

C. DOJ's Policy Does Not Provide Definitive Assurances

DOJ policy is similarly vague, and does not provide the kind of definite assurance necessary to encourage companies to audit frequently, thoroughly, and aggressively. DOJ sets out several factors which come into play in determining whether or not to bring criminal enforcement actions based upon violations discovered in the context of routine audits, including: voluntary disclosure, cooperation, preventive measures and compliance programs, pervasiveness of noncompliance, internal disciplinary action, and subsequent compliance efforts.[7] Although DOJ attempts to provide several hypotheticals to illustrate how these factor function together, the guidance provides little predictability. Furthermore, DOJ does not provide any official policy where civil penalties are concerned.

D. EPA and DOJ Policies Require Companies to Waive Their Rights Against Third Parties

EPA and DOJ policies require companies to "cooperate" completely and to disclose audit materials in order to retain any hope of leniency. However, such disclosure effectively requires companies to waive their common law privileges for purposes of third party actions, as well.[8] Because the doctrine of waiver has been constructed by the courts, a change in agency rules or policy to allow for "limited waiver" would not be binding law. The only way to protect audit materials from third parties is

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[6] *See e.g., U.S.* v. *Weitzenhoff,* 35 F.3d 1275 (9th Cir. 1994).

[7] Richard B. Stewart Memorandum, at 2–6.

[8] The courts have been divided over whether documents disclosed to the government in enforcement actions are eligible for the protection of common law privileges against disclosure to third parties in other actions. *See Westinghouse Electric Corp.* v. *Republic of Philippines,* 951 F.2d 1414 (3d. Cir. 1991) (privilege waived); *In re Martin Marietta Corp.,* 856 F.2d 619 (4th Cir. 1988) (privilege waived); *Permian Corp.* v. *U.S.,* 665 F.2d 1214 (D.C. Cir. 1981) (privilege waived); *Diversified Industries. Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1977) (privilege upheld).

either by EPA and DOJ not requiring their disclosure in the first place or by *Congressional enactment.*

V. H.R. 1047 ADDRESSES THE CONCERNS OF REGULATORS AND PUBLIC INTEREST GROUPS

The primary criticism that regulators and public interest groups level against a self-evaluative privilege for environmental audits is that it enables egregious violators to "hide the ball." However, such criticism is unfounded for the most part because conditions prerequisite to enjoying an audit privilege under most state enactments and under H.R. 1047, eliminate this possibility.

First, if a violation is egregious because it is a repeat offense, chances are good that the self-evaluative privilege under H.R. 1047 will not apply because the bill prevents the privilege from applying to companies whose compliance history shows a "pattern of violations." (Whether or not it is appropriate to limit such history to three years prior to the violation is debatable.)

Second, if a violation is egregious because it is continuous and the violating company has been lax in correcting it and remediating any resulting environmental contamination, H.R. 1047 expressly provides that the privilege is unavailable.

Third, if a violation is egregious because it causes substantial harm to the environment, the privilege arguably would not apply under H.R. 1047 because "compelling circumstances" can permit disclosure of audit materials. (H.R. 1047 may need some clarification of "compelling circumstances" on this point, or even a separate exception for imminent endangerment.)

Fourth, companies cannot hide violations which are already known to the government and subject to imminent investigation. Therefore, they cannot perform an audit after-the-fact to cloak information related to the violation. Similarly, they cannot easily claim that the violation was discovered as a result of an earlier, fictional routine environmental audit because of the "fraudulent purpose" exception. If there is concern that the "fraudulent purpose" exception is too vague to address this type of problem and that, as a result, it will spawn enormous evidentiary litigation, there are means to fix the problem short of eliminating the privilege entirely. For example, where audits are required to be performed and records kept by independent third parties, it would be extremely difficult for companies to construct their records to support a claim that the violation was discovery as a result of a prior, fictional audit.

VI. CONCLUSION

To the degree that regulators and public interest groups have any other similar kinds of concerns, they can undoubtedly be addressed by reasonable means short of prohibiting a self-evaluative privilege entirely. And, given that EPA and DOJ claim to rarely request audits and virtually never use them to prosecute companies, those concerns ought to shrink in comparison to the enormous benefits to be gained by providing clearer and more positive incentives for companies to audit effectively and disclose violations discovered as a result.

Mr. GEKAS. We have been beckoned to the floor by the bells but we are not going to make you wait around here because we may be stuck there for a long period of time.

We will limit our questions to one or two for each of you or all of you.

Mr. DeSchamps, I am getting from your testimony that you have prosecuted these types of cases for criminal violations in the environmental laws.

Mr. DESCHAMPS. I have not or I have?

Mr. GEKAS. You have.

Mr. DESCHAMPS. I have, yes.

Mr. GEKAS. Yes. Did any of them come to your desk as a result of a voluntary disclosure by any company?

Mr. DESCHAMPS. No.

Mr. GEKAS. Doesn't that mean that when there is a criminal violation of sufficient proportions that would lead to a prosecution, it came to your attention, you investigated and you prosecuted?

Now, isn't it a salutary thing that if a company voluntarily comes forward and discloses something for which they hope they get back

the promise that they will not be smashed up against the wall and find and prosecuted and so forth, and you have no instances of a voluntary thing that led to a prosecution, can't the two live together?

Mr. DESCHAMPS. Mr. Chairman, I certainly encourage voluntary disclosure. I don't think there has been a witness here today that would oppose voluntary cooperation amongst the regulators and the regulated. Our problem, as prosecutors, has to do with the cloak of what has been described as secrecy that comes over the top of this.

I made a note early on. It seems like every supporter stresses cooperation and voluntary compliance. But how do we foster cooperation with the cloak of secrecy?

Mr. GEKAS. Don't we have privilege in other facets of the criminal law?

Mr. DESCHAMPS. Oh, yes.

Mr. GEKAS. Isn't that utilitarian for those bodies of law?

Mr. DESCHAMPS. No, as a matter of fact.

Mr. GEKAS. It isn't? I think it is. I am a former prosecutor. I thought it was——

Mr. DESCHAMPS. Actually, we have lots of trouble with, for example, the attorney-client privilege, which is frequently used as a foil to prevent prosecutors from getting to——

Mr. GEKAS. I have used it many times.

Mr. DESCHAMPS. Pardon me?

Mr. GEKAS. Sorry.

Mr. DESCHAMPS. Well, that is a good example of the problem area with the privilege.

Mr. GEKAS. But I am saying it is a sacrosanct part of our law to grant that type of privilege in return for other benefits that the law would give. I end my one or two questions and we can go.

Mr. Reed.

Mr. REED. Thank you, Mr. Chairman, I want to commend all of you.

Mr. GEKAS. Yes, we thank you.

Mr. REED. Your testimony has been very helpful.

Mr. Block, you pointed out something that should be considered: the beneficial effects of early identification of problems and early remediation. That is something we certainly should consider.

I was struck by something listening to not only Mr. DeSchamps but also his predecessor from Kansas. If we flash back 10 years and put this debate in the context of self-auditing of savings and loan institutions, and we made these arguments about how they could do it themselves and they don't need regulations and, therefore, they are pretty responsible, which generally they were—it just strikes me that there is this real danger. And it might not be the majority of people, but just one or two unscrupulous operators could seize upon this as a way to do significant damage to the environment, as others have done damage to financial institutions.

The other thought I have and this is more comment than question because of the time, and is a return to a theme I raised before. In the area of financial operations, there is a professional standards of accounting, there is a recognized procedure. The SEC has

elaborate rules about what is an appropriate audit, how do you do it, all these things.

I think where we are here is in an area where there is not that same type of elaborate environmental audit standards, professional organizations that have enforced them, years of trial and error in which those standards have been refined, et cetera. So I think we have to consider that also.

But I just want to conclude, because of the time and the vote, by thanking you all for your very valuable testimony.

Mr. GEKAS. I echo those thanks.

The following statements and letters will be submitted for the record.

[The statements and letters follows:]

PREPARED STATEMENT OF ROBERT H. LAMB AND JOHN W. HEIDERSCHEIT III, WRIGHT & TALISMAN, P.C.

Potlatch has been supportive of the philosophy embodied by H.R. 1047, the Voluntary Environmental Self-Evaluation Act, which was introduced by Congressman Joel Hefley of Colorado on February 24, 1995. Our company believes that current governmental policy inappropriately is skewed toward enforcement at the expense of the full realization of the societal health and welfare fruits which would be available from rigorous widespread environmental self-critical analysis by the business community. At the same time, we believe that the existing enforcement-driven environmental policy is hopelessly out-of-date and produces counterproductive, uncompetitive consequences that are not synchronized with the realities experienced by some of our competitors in the global economy.

The non-governmental witnesses at the June 29, 1995 hearing before the Subcommittee on Commercial and Administrative Law made a very persuasive case for enactment of H.R. 1047. Since we generally regard their testimony with approbation, we will not cover the same ground. Instead, we wish to make only a few observations in response to the statements of the federal government witnesses.

Focusing on the summary testimony of Steve Herman of EPA, we will speak to the five points he tries to make, as follows:

The fact that environmental audits increasingly are employed and that there are many incentives to perform them misses the reality that often the audits are not as thorough or as internally helpful as they could be because of attorney-client privilege concerns and the spectre of existing enforcement policies. The fact that the government does not rely on audit reports to *initiate* enforcement action does not displace the genuine belief, ruefully based on experience by the regulated community, that audit reports may be sought subsequently.

We disagree with Mr. Herman's glowing assessment of EPA policy. Potlatch previously submitted comments to EPA regarding some of the grievous shortcomings of its Interim Policy on Self-Policy and Self-Disclosure. A copy is attached for inclusion in the hearing record along with this statement.

There is no *guarantee* of immunity for criminal conduct in H.R. 1047, nor should there be. The common sense factors for rebuttal of any otherwise applicable presumption should prevent willful criminal conduct from escaping appropriate sanctions.

The public is the intended beneficiary of numerous reporting provisions in environmental statutes which insure that the citizenry is informed about the performance of companies in that regard. There is no need to expose information which, absent an environmental self-evaluation, would never have even been discovered or reported. It would serve as a great disincentive to analysis.

Penalty reduction for voluntary self-evaluation is a woefully inadequate substitute for the appropriate incentives H.R. 1047 offers because those companies which will be undergoing the environmentally proper function of self-evaluation would be financially punished, whereas the companies that did not even have such an audit program would, absent a chance, thorough governmental investigation, escape such a burden.

Regarding the testimony of Randall Rathbun of DOJ, which has been effectively rebutted by other panelists, we will address only a few of his points, as follows:

DOJ criticizes the bill because it fails to give an exemption from immunity for legally required disclosures. Virtually every release or other activity by the regulated community with real or imagined potential adverse effect on the envi-

ronment is required to be disclosed to EPA. Thus any statute that attempts to craft some level of immunity where industry aggressively ferrets out and discloses adverse environmental impacts will grant immunity for disclosures required to be made by law. The key to H.R. 1047 is that it does not merely require disclosure at the end of the month (as with Discharge Monitoring Reports) or quarterly (as in the case of many stack tests under the Clean Air Act). H.R. 1047 goes much further. The disclosure must be made "promptly," not weeks later. And the person making disclosure must begin to correct the problem within a reasonable time. These latter steps are not generally required by federal environmental laws and represent a real benefit of the immunity provisions of H.R. 1047.

DOJ contends that through "negligence, recklessness, or perhaps even intentional conduct," a company could allow an oil pipeline to leak for years and contaminate the drinking water and, after allowing the leaking to continue for years, the company could escape penalties simply by reporting the matter to EPA. This is preposterous, as DOJ well knows. H.R. 1047 provides for no such scenario. If a company knew "for years" that a pipeline was leaking and then disclosed to EPA, the disclosure clearly would not confer immunity. The disclosure would not "arise out of a voluntary environmental self-evaluation." Moreover, the company would not have "ensured that the disclosure [was] made promptly after receiving knowledge" of the violation.

DOJ postulates that a company could "forego improvements necessary to meet environmental requirements, so as to save expenses and increase profits" and thereby gain a competitive advantage worth millions of dollars. DOJ says that the company could later "blow the whistle on itself" and retain the millions of dollars and any increased market share it may have obtained, without any penalty. DOJ's analysis is, to put it charitably, not up to even that agency's usual legal standards. Again, because the discovery of the violation would not have been made due to a voluntary environmental self-analysis and the disclosure to the government not made "promptly," it is obvious that no immunity would be gained by the company in such a hypothetical situation. The company would be required to make the improvements. In addition, the company would almost certainly face criminal charges and would be required under the "economic benefit" component of the EPA's penalty policy to discourage the competitive advantage.

JUNE 29, 1995, LETTER TO CAROL M. BROWNER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FROM ROBERT H. LAMB AND JOHN W. HEIDERSCHEIT III, WRIGHT & TALISMAN, P.C.

Re: Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement (April 3, 1995)

Dear Ms. Browner: This submission is offered on behalf of Potlatch Corporation by Wright & Talisman, P.C. to the request for comment by the Environmental Protection Agency (EPA) on its Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, as published on pages 16875–16879 in the *Federal Register* on April 3, 1995.

INTRODUCTION

At the outset, we note that Eric Schaeffer, Deputy Director for EPA's Office of Compliance, acknowledged, at a D.C. Briefing on Environmental Due Diligence on April 18, 1995, that the Agency has identified several areas of concern or criticism with the interim policy. He indicated that, under the policy, penalty reduction provisions would not be available to the extent a company were required by law or regulation to disclose violations. According to page 2485 of the *Environment Reporter* of April 21, 1995, Mr. Schaeffer said that "his personal view was that if regulated entities discover a violation through an audit and promptly disclose it they should qualify for penalty reductions regardless of whether the noncompliance had to be reported." Also, the same article mentioned that he stated that if industry wants an environmental audit statute, the Agency is prepared to discuss the issue.

The openness, flexibility, and fresh thinking evinced by Mr. Schaeffer is a welcome contrast to the disappointing and unconciliatory attitude expressed elsewhere by other EPA officials. Indeed, EPA Administrator Browner, in a March 27, 1995 speech to the National Association of Attorneys General raised the threatening spectre of reversion of delegated authority to EPA for States with self-audit legislation. Also, the March 1, 1995 written response of EPA Assistant Administrator Herman to H.R. 1047, Congressman Joel Hefley's self-evaluation bill, suffused from inaccura-

cies and defensiveness in its criticisms, as well as unrealistic speculation about its probable effects if enacted.

GENERAL OBSERVATIONS

Disclosure

The EPA has unfortunately linked its voluntary compliance evaluation inextricably to disclosure. Such an approach particularly makes little sense regarding uncovered violations for which there are no independent reporting requirements. The fact is that disclosure often would involve too many collateral risks—such as toxic tort suits, citizen suits and State enforcement actions. At the very least, EPA should treat environmental audits as privileged information, insulated from third-party access, after a company voluntarily reports, and agrees to correct expeditiously any discovered noncompliance. Mr. Schaeffer reportedly indicated, at the aforementioned meeting, that EPA would support such an approach.

Certainty

One of the reasons for the high level of enthusiasm in the regulated community for State, and indeed Federal, legislation to provide a self-evaluation privilege and limited immunity from penalties is that it would set forth predictable, fair ground rules for the consequences of environmental management systems. On page 16876 EPA states that its "interim policy is intended to promote environmental compliance by providing greater certainty as to EPA's enforcement response" in a given set of circumstances. That purpose is not achieved. The problem is not only that just a limited mix of actions may be accorded favourable treatment by EPA, but also that the policy itself is devoid of any certainty. This is readily apparent when one examines Section V, on page 16879, dealing with limitations on applicability of the policy. Section V clearly states that the policy is only guidance, the application of which in any case is at the sole, judicially non-reviewable discretion of EPA and may be changed without notice. Thus, a legitimate inquiry must be—greater certainty than what? This is analogous to "A Mad Tea-Party" in Lewis Carroll's *Alice's Adventures in Wonderland*, to wit:

> "Take some more tea," the March Hare said to Alice, very earnestly.
>
> "I've had nothing yet," Alice replied in an offended tone: "so I can't take more."
>
> "You mean you can't take less," said the Hatter: "it's very easy to take more than nothing."

CONDITIONS OF THE INTERIM POLICY

The expressed conditions in Section II of the policy, found on page 16877, are critiqued *seriatim*, as follows:

Voluntary Self-policing

The condition that the self-evaluation be appropriate to the size and nature of the regulated entity is ambiguous because the definition of "regulated entity" in Section II is tautological. Thus, for businesses, is the entity a company or is it the given facility? If entity is congruent with company, then a facility, regardless of size, owned by a larger company might be subjected to a higher standard than that of a large facility of a smaller company. That would make no environmental or competitive sense. The key should be the nature of the facility, rather than company size or nature of the industry.

Voluntary Disclosure

This condition is burdened with numerous ambiguities, not the least of which is what information may be required. What is the effect on the incentives relating to an ongoing audit, if an inspection occurs in the meantime? To what extent could an EPA investigation that is narrowly focused jeopardize the possible incentives flowing from a full-fledged and wide-ranging self-evaluation? How is knowledge of an imminent discovery of a violation to be imputed?

Prompt Correction

The proper approach for corrective action is not to tie the condition to a ridiculously short period (60 days), on the one hand, and an elastic alternative one on the other. Rather, it should be to require the initiation of corrective action (including permit applications) within a reasonable time that is adequate to achieve compliance as expeditiously as practicable. This would give some context to "expeditiously as practicable." At the same time it would avoid any bias toward 60 days as being appropriate absent proof to the contrary.

Remediation of Imminent and Substantial Endangerment

Given the eligibility for mitigation under Section II.C.1.b.(ii) in cases "involving" an imminent and substantial endangerment, but not serious actual harm, is any condition that *has* created such an endangerment treated the same under the policy as one that *may* so create?

Remediation of Harm and Prevention of Repeat Violations

This condition is ambiguous because it is without any objective parameters. That is, what does "remedy" encompass and what does the possibly speculative "harm to the environment" mean, given that they are not defined or referenced in the interim policy. In short, the unelaborated condition could be employed to impose considerably greater obligations than individual environmental statutes, whether Federal or State, would otherwise mandate.

No Lack of Appropriate Preventive Measures

This condition is ambiguous because often each day could constitute a separate (*i.e.*, repeat or recurring) violation. Therefore, the condition needs to be clarified to indicate that the appropriate steps, once discovered, were not taken expeditiously if a reasonable period of time existed to avoid repeat or recurring violations.

Cooperation

This condition is a grant of limitless authority to the Federal Government because it speaks to a level of cooperation "as required by EPA." At least the informative component is tempered by a restriction that it be "reasonably necessary." However, there should be the additional requirement that the information be relevant.

OTHER ISSUES

Attorney-Client and Work-Product Privilege

In Section II.E.2., EPA states that the interim policy in no way limits the right of regulated entities to claim common law privilege. Of course, some such privilege claims have been upheld by the courts. However, because of uncertainty about the degree of protection, or the waiver ability thereof, that may be accorded such claims, the regulated community, in some instances, may be reluctant to provide full information to some of those very employees that could benefit from knowledge gained in a self-evaluation.

Privilege and Immunities

In Section III, EPA succinctly sets forth its interim policy as "a positive alternative to across-the-board privilege and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities." EPA's policy is presented as an alternative to a strawman that no responsible stakeholder is advocating. All the privilege statutes that have been embraced or considered by the several States or introduced in Congress are carefully limited and caveated in their application. Thus, in reality there is no across-the-board alternative against which the EPA policy is properly juxtaposed. It should not be surprising, therefore, that EPA's discussion to justify its approach is deeply flawed and filled with misconceptions.

The economic advantage of limited penalty immunities as a total concept is improperly conceived by EPA. It may be that companies, in some instances, may derive a competitive advantage. But, for immunity to apply, the competitive advantage has been dearly purchased at the expense of possible adverse public relations or consumer reaction to disclosure, possible litigation and a commitment to expend capital in a satisfactory, scrutinized timeframe to correct deficiencies. Further, there is considerable doubt that some noncompliance, previously undiscovered elsewhere, fairly could be labeled as an economic benefit. In fact, it would be more likely that some competitors, without such a commitment to self-evaluation, may be blissfully ignorant of noncompliance or at least have their own self-evaluation roadmapped for them. EPA should be cognizant as well of the considerable expense incurred by a company which has a sophisticated environmental management and self-evaluation system which can uncover and divert capital toward correction of problems. Other companies, without such an environmental commitment, may incur cheaper operating costs during key, intensely competitive business cycles.

EPA states the obvious in observing that a principal rationale for audit privilege and penalty immunities is to reduce expenses. The question is whether the EPA has appropriately and fully addressed this concern. The incentives EPA has offered are not a viable substitute over properly crafted privileges and immunities.

The statement that privilege runs counter to efforts to open up environmental decision making and encourage public participation is unilluminating. This is so be-

cause the whole environmental regulatory scheme is suffused with an abundance of public input and scrutiny. EPA should remember that the overarching purposes of environmental laws is to protect the public health and environment, not to invite the public to examine every aspect of a regulated entity's business.

The EPA assertion that an environmental privilege could be misused to shield bad actors or frustrate access to crucial factual information is a classic red herring. It is so because the exceptions, exclusions and procedures delineated in privilege legislation would provide a reasonable and ordered process to prevent abuse.

EPA speaks of increased litigation draining government and private resources, but seems oblivious of the fact that governmental enforcement resources will be reduced because of budgetary constraints. Thus, voluntary efforts by the regulated community are needed more than ever. Given compliance demands relating to the complex, voluminous regulations promulgated by EPA, the Agency is poorly placed to complain about draining societal resources.

Lastly, the observation by EPA that the self-evaluation privilege has not enjoyed universal sanction by the judicial system is more of an argument for passage of a legislative solution than an endorsement of the approach suggested by EPA.

Consequences for States

EPA, by threatening greater scrutiny, evokes a thinly disguised paternalistic and hostile stance toward States that dare exercise their rights to enact audit privilege and limited penalty immunity legislation. This is inimical to the general concept of delegated primary enforcement authority to the States and creates a poisonous atmosphere because of the lack of comity.

CONCLUSION

On page 16875, EPA acknowledged that the goal of environmental compliance with federal laws "can be achieved only with the voluntary cooperation of thousands of businesses and other requested entities." Yet, EPA's interim policy is woefully defective and fails to provide sufficient, appropriate incentives for the reasons discussed above. Though EPA has stated a willingness to consider further refinements in its policy, a thorough revamping is necessary in order to help make its stated goal more likely of attainment. Glacial progress on the part of EPA to modernizing its enforcement policies is one reason why so many companies, including Pot latch, support innovative Federal legislation, such as H.R. 1047 and S. 582. We urge EPA to do likewise.

PREPARED STATEMENT OF CHRISTOPHER B. DOLAN, ASSOCIATE, ROBINS, KAPLAN MILLER & CIRESI, SAN FRANCISCO, CA

PREFATORY STATEMENT

I, Christopher B. Dolan, do hereby submit this written opposition to H.R. 1047. This written opposition is filed in lieu of personal testimony which was summarily denied by the sponsors of the bill despite numerous efforts by minority members of the Committee to have representatives from the public interest sector, the trial bar, citizens groups, and environmental groups. The hearings held on June 29, 1995, were an affront to the democratic process. Not one member of the public interest community, citizens actions groups, environmental groups or the trial bar was permitted to attend, despite numerous efforts to gain representation. These types of exclusive hearings undermine the democratic process and the faith of the citizenry in their elected representatives to deliberately and conscientiously legislate on behalf of all the affected parties. H.R. 1047 is bad law which is being forwarded through flawed procedural means.

INTRODUCTION

Silence! Oh well are Death and Sleep and Thou
Three brethren named, the guardians gloomy-winged
Of one abyss, where life and truth and joy
Are swallowed up [Shelley, "Fragments: Silence"]

There should be no privilege granted the corporate polluter. There should be no immunity either. This statement is unequivocal and absolute. This government should not participate in, or be a party to, concealing unlawful conduct from its citizens. Likewise, this government should not grant immunity to illegal actors based on their belated confessions. In this day of law and order, complete with "three strikes you're out" and a general shift towards incarceration and retribution, the grant of secrecy and immunity to the corporate fiction flies in the face of equality,

equity, and sound sociological and legal reasoning. The dissonant voices of popular society seem to shout hollow words across the isle. As they cry out for harsher penalties, no mitigation, no rehabilitation and the deprivation of liberty for any individual who breaks his/her-contract with America, their words, when echoed towards their own corporate self interests cry for immunity, mitigation, rehabilitation and another chance. How flexible conscience is when self interests are balanced in the scales of justice. The federal law must not act as a vehicle of dissonance and inconsistency nor can it be a bill of privilege for a select class, a corporate fiction. The nation's enunciated policy must be strong, firm and resolute with one sole objective—to reduce and eliminate the cancer of pollution which threatens the national security interests of the United States of America. This objective can only be accomplished by a resolute commitment to deterrence through strict and sure penalties for industrial wrongdoers accompanied by a policy of mitigation for those corporate actors who voluntarily police and self report.

THE HISTORICAL FRAMEWORK

This dialogue can not take place without considering the historical landscape. The enunciated laws of the nation were enacted by the people to protect themselves from the carnage of industrial America. Our country, as well as its people, were being poisoned by the excrement of the U.S. industrial Goliath. The people, in enacting these laws, were reacting to a real and present danger. That danger has not subsided. In fact, it has magnified as industrial America has moved ever closer into our neighborhoods and communities. The byproducts of our progress and affluence are accumulating around us daily. While eternally grateful for the progress brought by corporate industry, the people remain leery of the specter of the past. They are concerned about their neighborhoods, their rivers, their air and their seas. They have watched as their country was poisoned and their communities destroyed. They remember Love Canal and the Exxon Valdez. They want to feel strong, proud and safe. They want to feel less afraid of the risk of cancer. They want their children to be able to play in the rivers, lakes and beaches of our beautiful country. They want to believe in a future for themselves, their children and their environment. They look to the United States Congress and the EPA to act as their guardians.

The people of the United States have made their will known through the democratic process. They have enacted firm and detailed environmental protection legislation and, through this process, have empowered the executive to police industrial America. These same people who have breathed life into the corporate fiction through legislation, have demanded that their creation behave responsibly or face sure and severe punishment. As they created their government with limited power, they created the corporate fiction as a regulated entity subject to checks and balances.

Today, industrial America has put on a new face and comes forward claiming to have divorced itself from its unsavory past. As with any recidivist seeking parole, the plea of this fiction must be scrutinized with great skepticism. The risks to society are monumental. While favorable conduct needs to be rewarded and compliance with the legal regimen needs to be encouraged, special privileges or immunities to this class of society are without foundation. The federal law should maintain a legislative policy of accountability and deterrence maintaining the free flow of information and prosecutorial discretion. The risks of history repeating itself are far too great.

INDUSTRY'S ARGUMENT

Through participating in hours of dialogue and testimony on both the federal and state level, the Industrial Argument appears to be framed as follows:

Compliance is a desired objective;

Corporations are often out of compliance (polluting), sometimes inadvertently, sometimes deliberately;

There will always be incidents of non-compliance, as the industry and the regulations are complex and the human element gives rise to error;

Industry is reluctant to self-evaluate and/or audit for fear that it will uncover non-compliance (pollution) and will be required to self report; industry is also fearful that self-evaluation and/or self audits will be used by the EPA, DOJ, state prosecutors, citizens groups and third parties as road maps for prosecution;

If industry voluntarily acts responsibly and audits its facilities, identifies violations and discloses them to the EPA, it wants to keep this information secret from the other stakeholders; ie., the neighbors within the surrounding commu-

nity, the workers within plants and facilities, the state prosecutorial agencies and the citizens/public interest groups;

Industry wants immunity from civil penalties, criminal enforcement and third-party action for self reported illegal conduct;

If industry is given privileges and immunities it will comply with federal and state law by reviewing its operations, disclosing illegal activity (noncompliance) and correcting the same; without this special treatment, it will continue to hide its head in the sand, not police itself, continue to pollute and not identify illegal conduct until audited by the state or Federal environmental agencies .

While industry emphatically pleads the case for these special rights, it has failed to produce evidence of either the need for such privileges and/or immunities. Likewise, it has failed to demonstrate any significant benefits which would accrue to the American people in exchange for these new powers. In short, privilege and immunity is a questionable solution looking for a non-existent problem.

H.R. 1047 is a bad bill. Not only does it attempt to solve a "phantom problem" it is a secrecy bill of the worst kind which creates a significant moral hazard through the grant of immunity and privilege to a segment of society which has repeatedly demonstrated its contempt for the laws of both humankind and nature. Instead of pursuing a course of secrecy (immunity and the accompanying distrust that such a policy will bring), the federal policy should be that of mitigation which is embraced in the Executive's approach as embodied by the EPA policy on environmental audits. Outlined below are reasons why a policy of mitigation, not secrecy, is the appropriate national policy.

WHY EPA'S POLICY IS THE RIGHT POLICY

Mitigation is the proper incentive

Industry leaders, environmentalists, prosecutors, public interest groups, the EPA, and the people through their elected representatives, agree that effective deterrence (compliance) is achieved through rational enforcement. Environmental crimes and environmental non-compliance have potentially lethal consequences. Bad actors must be punished while those actors who inadvertently violate the law and voluntarily report are deserving of some benefits for self reporting. As in any other area of law enforcement, penalty mitigation is the appropriate tool to encourage cooperation with law enforcement.

The Interim EPA Policy provides generous mitigation incentives

The Interim EPA Policy provides for up to 100% mitigation of the gravity (punitive) component of any EPA action if the offending company voluntarily reports and complies with the seven EPA criteria. If the offending entity complies with less than all of the seven requirements, it is still eligible to receive up to 75% mitigation for a self-disclosed violation. Additionally, the EPA has indicated that its policy will discourage criminal referrals in those cases where the seven criteria have been met. This statement of mitigation is unparalleled in any other segment of the law today. These attempts at creating a safe harbor are ample to reduce the disincentives which industry claims act as barriers to self-reporting. Industries' calls for immunity and secrecy are but self-serving attempts to create a privileged class which is immune from prosecution. Any further protection for industry will ultimately result in the creation of a significant moral hazard where industry, impervious to legal restraint, will act in selfish defiance of the interests of the environment, workers and community members. While H.R. 1047 fosters secrecy, the EPA policy fosters openness, communication, cooperation and compliance. The EPA policy, not H.R. 1047 should be the national policy to promote environmental auditing and compliance.

Mitigation retains the prosecutorial discretion of the executive

The policy of mitigation outlined in the EPA Interim Policy preserves prosecutorial discretion which is essential to successful functioning of the Executive. H.R. 1047 would cripple the Executive branch in its enforcement efforts. The EPA, as well as other prosecutorial agencies, charged with safeguarding the citizenry need this flexibility to deal with the myriad situations which present themselves in this area of environmental enforcement. Flexibility is essential to provide the EPA with a fair and appropriate response to voluntarily reported non-compliance (pollution).

H.R. 1047 would lead to increased litigation

H.R. 1047 would lead to a dramatic increase in litigation as corporations scramble to protect information from disclosure through pretrial legal maneuvering. It is guaranteed that if H.R. 1047 becomes law, every environmental action will require a lengthy judicial proceeding to determine the existence and scope of any right of privilege. H.R. 1047 will result in the creation of a litigation explosion. unlike H.R.

1047, the EPA policy provides strong incentives for voluntary compliance without clogging our already over-crowded courts with unneeded litigation.

The EPA Interim Policy protects the public right to know

"The search for truth is the noblest occupation of man; its publication a duty." [Madame De Stael, "Germany," PT. IV, Ch II.]

While H.R. 1047 fosters concealment, the EPA policy does not encourage secrecy. This preserves the public's right-to-know and instills confidence in government and industry. Industry, weary of "bad publicity" wishes to keep their dirty little problems secret from workers and neighbors whose interests are critically affected by the grab for privilege and immunity. Just as industry wishes to "audit" its activities so it can plan for the future with certainty, the workers within the plants, and the neighbors living but a stone's throw away from possible extinction, want to feel safe and secure in planning their futures. The industry wish-list would cast a veil of secrecy over information which directly affects the choices made by these other stakeholders.

Citizens want to know if their breadwinner is being exposed to lethal contaminants when she goes off to work each day. Would we venture to return to the days when children were unsuspectingly poisoned by the asbestos being carried home on the clothes of shipyard workers? A policy of concealed information would allow information of such risks to go unreported and unknown. Should the neighbors of a toxic waste facility be deprived of information pertaining to a company's record on pollution? A policy of secrecy would do just that by allowing industrial America to hide the truth about its activities. These stakeholders need this information to make critical decisions such as where to buy a home, where to raise children, where to plant their vegetable gardens and where they can let their children play. If privilege is granted to industry's illegal conduct, the only information ever received by these stakeholders may be the sound of a siren alerting them of impending doom as a poisonous cloud brings toxins, disease and death into their communities. This is too great a price to pay for increased corporate profits.

Industry's statements that it will not voluntarily self-regulate without special privileges and immunities (offered to no other segment of society) is an attempt to take advantage of the resource limitations of the EPA through a form of environmental blackmail. Sighting the limitations of EPA, and the relatively low probability of agency investigation and detection, industry threatens to go on polluting without disclosure and correction unless they receive its ransom, privilege and immunity. No more credence should be given to this argument than to the argument of an embezzler who states that he shall keep on stealing, undetected, unless he is granted complete immunity and a privilege.

What industry fails to recall in its arrogant grab for power is that, regardless of the certainty of detection, compliance is not optional, it is the law.[1] The attitude expressed by industry cries for greater policing, greater resource allocation towards investigation, and perhaps greater penalties to reshape the defiant behavior of certain recalcitrants.

If industry is admittedly behaving unlawfully based on a low probability of detection, then either the probability of detection or the penalty attached to a violation must be increased so that the expected cost of detection (probability of detection (PD) x penalty violation (PV) = expected cost of detection (ECD)) acts as a sufficient deterrent against non-compliance. The EPA Interim Policy of mitigation will reward those conscientious self-policing actors by reducing the ECD Up to 100% while maintaining the high ECD for the unscrupulous actor. This is an appropriate policy. H.R. 1047 changes the equation so as to make both PD and PV equal to zero. Therefore, it completely eliminates the powerful deterrent that enforcement has provided for over twenty years. Rather than bow to industry's blackmail, Congress should support the EPA both through increased funding to assist in its policing efforts and through support and endorsement of the EPA's policy of mitigation.

Mitigation promotes economic efficiency

H.R. 1047 fosters inefficient markets which will result in a national environment deficit. Businesses are economic entities operating in the capitalist arena. Pure cap-

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[1] Industry claims that it is the act of self-discovery and voluntary reporting which causes a "disincentive" when legal accountability is sought by the EPA, prosecutors, citizens groups and/or third parties. Industry's argument reveals the lack of responsibility taken by corporate America. It is neither investigation nor reporting which creates the problem; it is the violation of an established law which gives rise to potential liability. If industry eliminates its non-compliance (pollution), it will eliminate its exposure to legal action.

Its move towards privilege and immunity is a disingenuous attempt at addressing a symptom rather than a genuine attempt at correcting the underlying problem.

italism, the model sought in our democracy, requires that there be perfect information so as to foster an efficient market equilibrium. The exchange of information regarding a corporation's performance and the true costs of its activities is essential for the appropriate allocation of resources. This equilibrium is measured either as a function of cost or of social utility. If information is withheld from the marketplace, the true costs of production will be distorted resulting in a fictional price that creates false profits, fosters over-consumption and leads to reduced utility. This leads to an economic and environmental deficit which, as we have seen through the tremendous superfund expenses incurred by the EPA, will ultimately be born by others rather than the producers and consumers of these products.

In order to have efficient markets and an appropriate level of consumption of particular goods and services, the true costs of industrial activity must be known to citizens, government and consumers. By withholding information about the true costs associated with pollution from workers, neighbors, government and citizens groups, industry can manipulate price and encourage over consumption of services and goods resulting in excess pollution. It is ironic that many of the same voices calling for privilege and immunity are calling for a balanced budget amendment. They apparently see no contradiction in demanding that the taxpayer finance the true costs of social programs while simultaneously creating an environmental deficit by hiding the true costs of industrial production. As with the government deficit, this environmental deficit presents a significant threat to our society's future and represents a deferred expense which shall one day be borne by our progeny. H.R. 1047 will forever keep the true costs of environmental pollution secret.

The EPA Interim Policy prevents the creation of a privileged class

Corporate America must realize that it is a citizen just like any other citizen. The grant of privilege and/or immunity to corporate America as proposed in H.R. 1047 would be a significant departure from several hundred years of common law; this grant of power has been previously denied the President of the United States, Richard Nixon. "[T]he public has a right to every man's evidence."[2] The Supreme Court of the United States, in denying President Nixon a privilege, stated that "[l]imitations are only properly placed upon the operation of the general principal only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principal of utilizing all rational means for ascertaining truth."[3] There has been no demonstration that the public good will be greatly enhanced by the creation of a privilege for this class of society. In fact, the experience to date in the states which have enacted privilege laws has not demonstrated any significant benefit to society. There is no rush to self-report. Therefore, there should be no grant of this extraordinary power to this class of society. Corporate America needs to know that it must function as a member of society, following the same rules as ordinary citizens. A corporation, which self-reports, voluntarily corrects, and self-discloses should, like any other citizen confessing to a crime, be entitled to mitigation for their acceptance of responsibility. However, they should not be allowed to escape responsibility for their actions.

The EPA Interim Policy supports accountability and civil justice

It is apparent that industry is seeking to use the EPA policy and H.R. 1047 to insulate itself from liability for its wrongful conduct. By seeking a privilege for its dirty secrets—facts and data pertaining to environmental harm, property damage, workplace exposure, damage to surrounding communities and citizens—industry seeks to insulate itself from liability to third parties. Not only does this distort the economics of utility maximization and efficiency mentioned, supra, it is contrary to several hundred years of civil jurisprudence which have been the hallmark of peaceful dispute resolution in our country. Everyone is responsible for their wrongful, tortious acts—even industrial America. This end-run at tort reform must not be encouraged or condoned by the government of the United States. If industrial pollution causes harm, the polluter must pay. To make the unsuspecting consumer, worker or neighbor bear the costs of industrial pollution, disease and environmental harm would be an intolerable injustice. If it is inevitable that some harms will be caused by industrial activity, then industry is in the best position to pass these costs along to the consumers of its goods and services. In this way, the true costs of production are reflected, false profits are eliminated and industry is held accountable for its actions. H.R. 1047 eviscerates the civil justice system where the Interim EPA policy

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[2] *United States* v. *Nixon* (1974) 418 U.S. 683, 708 (citations omitted).

[3] *Elkins* v. *United States* (1960) 364 U.S. 206, 234, cited in *U.S.* v. *Nixon*, 418 U.S. at 710, n. 18.

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leaves the civil justice system intact. Therefore, the EPA policy, not H.R. 1047, is the best policy for America.

CONCLUSION

H.R. 1047 is a knee-jerk reaction to a Chicken Little argument by industry that "the sky is falling." It is a solution in a vacuum designed solely to promote the self-interests of the corporate fiction over the majority of Americans. It is bad law which will create a significant moral hazard which could turn back the environmental clock to a time where corporations polluted our nation indiscriminately. The correct course of action to promote industrial compliance is forwarded by the EPA through its Interim Environmental Policy. If Congress continues to pursue this course of legislation, it should, as has done the EPA, carefully consider the interests of all of the affected stakeholders, not just industry through legitimate participatory dialogue. Our environment and our nation's citizens cannot withstand the damage that this legislation would most certainly inflict.

LETTER DATED JUNE 14, 1995, TO CHAIRMAN GEKAS, FROM SUNDRY ORGANIZATIONS

Dear Chairman Gekas, the undersigned organizations strongly believe that federal environmental self-assessment and disclosure legislation is necessary to advance environmental protection through the elimination of an array of obstacles and disincentives that presently exist.

State and federal government regulators and prosecutors, environmental groups and the regulated community all agree that environmental self-assessment is a valuable management tool to improve compliance and prevent adverse environmental impacts. Regulated entities need to use this tool to identify and correct potential environmental problems, and improve environmental performance. The prospect that use of this tool will enhance the likelihood of civil and criminal sanctions or third-party liability, however, actually deters regulated entities from using self-assessment at all or forces its use in a fashion that does not maximize environmental protection. Indeed, because regulated entities and their employees are now under the constant threat of enforcement or third party action based on their own self-evaluations and disclosures, they are discouraged from identifying and disclosing potential noncompliance.

The solution to this problem is federal legislation that would:

Remove barriers to environmental self-assessments;
Promote timely correction and disclosure by regulated entities;
Not restrict similar State initiatives;
Allow for appropriate utilization of EPA enforcement resources; and
Retain appropriate EPA enforcement authority.

Legislation meeting these goals would:

Enhance compliance nationwide;
Increase environmental protection; and
Allow for U.S. companies to be more competitive in world markets.

Fourteen states have enacted laws to remove obstacles to effective environmental self-assessments, and another 12 states are still considering such legislation this year. EPA has recently proposed an interim enforcement policy regarding self-assessment and disclosure. This policy is a significant improvement over the Agency's prior approach, since it mitigates penalties for some disclosures. However, it does not eliminate the above-noted obstacles to environmental self-assessment and disclosure. Also, as EPA itself emphasizes, since it is only a policy, it does not even bind the Agency, much less provide the certainty needed by the regulated community. Thus, prompt Congressional action is necessary. That action should also support the progressive state efforts in this direction, in light of EPA's statement that it "will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws, and may find it necessary to increase federal enforcement" in those states.

All of the undersigned organizations agree that the enactment of federal environmental self-assessment and disclosure legislation in this session of Congress is essential. In order to advance this legislation, we urge you to co-sponsor H.R. 1047. We look forward to working with you to improve this legislation as it moves through the legislative process.

Sincerely,

Aerospace Industries Association of America, Inc., American Automobile Manufacturers Association, American Bakers Association, American Car Rental Association, American Feed Industry Association, American Forest & Paper Association, American Iron and Steel Institute, American Petroleum Institute, American Textile Man-

ufacturers Institute, American Warehouse Association, APPA: The Association of Higher Education Facilities Officers, Asarco, Incorporated, Associated Industries of Florida, Association of Washington Business, Battery Council International, Business and Industry Association of New Hampshire, Can Manufacturers Institute, Chemical Council of Missouri, Chemical Manufacturers Association, Coalition For Improved Environmental Audits, Corporate Environmental Enforcement Council, Inc., Delaware State Chamber of Commerce, Edison Electric Institute, Electronic Industries Association, Elf Atochem North America, Inc., Eli Lilly and Company, Footwear Industries of America, Georgia Chamber of Commerce, Grocery Manufacturers of America, Harris Corporation, Hoechst Celanese Corporation, Independent Lubricant Manufacturers Association, Institute of Shortening and Edible Oils, International Dairy Foods Association, International Institute of Ammonia Refrigeration, Iowa Association of Business & Industry, ITT Corporation, Kaiser Aluminum and Chemical Company, Leather Industries of America, Litton Industries, Inc., Lockheed Martin Corporation, Louisiana Association of Business and Industry (LABI), Mississippi Economic Council, National Association of Convenience Stores, National Association of Manufacturers, National Council of Farmer Cooperatives, National Electrical Manufacturers Association, National Mining Association, National Soft Drink Association, Non-Ferrous Founders' Society, Nucor Steel—Utah, Owens-Corning, Philips Electronics North America Corporation, Polaroid Corporation, Primary Glass Manufacturers Council, Society of Independent Gasoline Marketers of America, South Carolina Chamber of Commerce, Specialty Steel Industry of North America, Stone Container Corporation, Texas Association of Business & Chambers of Commerce, Texas Chemical Council, The BFGoodrich Company, The Institute of Internal Auditors, The Ohio Chamber of Commerce, The Procter & Gamble Company, Thomson Consumer Electronics, Inc., and Weyerhaeuser Co.

News Release Dated April 6, 1995, From Price Waterhouse LLP

ELIMINATION OF PENALTIES COULD LEAD TO MORE ENVIRONMENTAL AUDITING

Washington, DC—U.S. companies would conduct more environmental audits if they were assured that the results would not be used to penalize them, according to a major survey released today.

The results of the survey, conducted by Price Waterhouse LLP in February, showed that nearly two-thirds of companies that now perform environmental audits would expand such programs if penalties were eliminated for problems that the companies themselves identified, reported and corrected. Among those companies that do not perform audits, 20 percent fear that audit information could somehow be used against the company. The survey results follow by a few days the announcement of an interim policy from the U.S. Environmental Protection Agency on voluntary environmental self-policing and self-disclosure.

Among survey respondents that now conduct environmental audits of their facilities, 9 percent reported that their audit findings had been involuntarily discovered or disclosed, and 12 percent said audits results they had provided voluntarily had been used for enforcement purposes against them.

Of the 369 companies that participated in the survey, 75 percent said they have environmental auditing programs in place. Nearly all the companies surveyed with U.S. sales of $1 billion or more have such programs. Over 90 percent of those who conduct audits said they do so for good business or assurance reasons, or because they seek to be proactive in their environmental management. The primary reason given most often for auditing was to improve the company's overall environmental management program. Only about 10 percent of respondents perform audits in response to the 1986 EPA auditing policy statement. Companies that do not conduct environmental audits primarily stated that their products and processes did not have significant environmental impacts.

"Environmental auditing is an important topic for U.S. businesses," said Bob Jonardi, director of PW's Environmental Services Group. "About 60 percent of the companies that conduct audits have formal company policy statements on this procedure, usually signed by a board member, the CEO or company president. Over 95 percent report that management awareness has improved as a result of these audit programs."

Other significant findings from the survey included:

> Over 70 percent of companies with environmental auditing programs said the audits have significantly improved the company's regulatory compliance. Nearly 50 percent said auditing improved employee awareness, diligence and compliance with company policies and procedures.

Results of environmental audits often are considered confidential. About 43 percent of companies that conduct audits consider the information to be attorney-client privileged or protected by the work-product doctrine.

Outside parties had attempted to obtain environmental auditing data from 25 percent of the companies that conduct them. Outside parties successfully obtained this information from 15 percent of the companies.

The role of auditing in environmental compliance has been the subject of extensive public policy activity and discussion in recent months, and enforcement policies regarding the use of such programs are under review by the U.S. EPA. In announcing its policy review, the EPA encouraged the private sector to survey environmental auditing practices to measure the effect of enforcement policies on industry self-evaluation and disclosure.

At the request of the representatives of the regulated community, Price Waterhouse conducted the survey among businesses in 14 manufacturing and service sectors. Among the sponsors were members of the Compliance Management and Policy Group, including the American Petroleum Institute, the Chemical Manufacturers Association, and AT&T, Browning Ferris Industries, General Electric Company, Monsanto Company, and WMX Technologies, Inc.; the Coalition for Improved Environmental Audits; the Environmental Auditing Roundtable; and BFGoodrich Company, Eli Lilly and Company, and Texas Instruments Inc.

Price Waterhouse LLP, with 14,000 men and women in 106 U.S. offices, provides ideas, information and advice to help clients make better business decisions. It is part of the worldwide network of Price Waterhouse firms, which offer accounting, auditing, tax and consulting services to corporations and government agencies in 118 countries and territories.

Mr. GEKAS. Thank you very much. This hearing is concluded.

[Whereupon, at 12:55 p.m., the subcommittee adjourned.]

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